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(Reports)

(The Supreme Court.)

I] JANUARY [1968

THE SUPREME COURT OF INDIA.

PRESENT:—J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

T. N. K. Govindarajulu Chetty ... *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Capital or income—Compulsory acquisition of land—No provision in the statute for payment of interest on compensation—Interest awarded by decree of Court—Whether taxable.

By order dated 30th January, 1944, the Collector of Madras, exercising power under Rule 75-A of the Defence of India Rules, 1939, requisitioned a property belonging to the assessees. The property continued to remain under requisition till it vested in the Government of Madras absolutely in consequence of an order made on 24th May, 1949, by the Collector of Madras under section 5 of the Requisitioned Land (Continuance of Powers) Act, 1947, declaring the intention of the Government of Madras to acquire that property. The assessees declined the offer made by the Collector to pay Rs. 2,40,000 as compensation for acquisition of the property and interest at the rate of 6 per cent. thereon from the date of notification for acquisition and the dispute relating to compensation payable to the assessees was referred to the Chief Judge of the Court of Small Causes, Madras By order of the High Court of Madras in appeal from the order of the Chief Judge it was adjudged that the assessee be paid Rs. 5,00,000 as compensation for the property. The High Court also a awarded interest at the rate of 6 per cent. on the amount of compensation from the date of notification for acquisition. Section 6 of the Requisitioned Land (Continuance of Powers) Act, 1947, provided that compensation payable to the owner of the land should be determined in accordance with the provisions of section 19 of the Defence of India Act, 1939 and the Rules made thereunder. Under section 19 (1) (*e*) of the Defence of India Act, 1939, the arbitrator in making his award must have regard, *inter alia* to the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, in so far as the same can be made applicable. But neither section 19 (1) of the Defence of India Act nor the Rules framed under section 19 (2) and (3) provided that interest should be paid on the amount of compensation; in the present case, interest was, however, offered to be paid by the Collector and the High Court also awarded interest. In the assessment proceedings for the years 1955-56 and 1956-57 the assessees contended that the receipt of interest amounting to Rs. 1,28,716 was not income chargeable to tax but was only a capital receipt. The Department held that it was income, but the Tribunal held that it was not. The High Court, on a reference, held that the amount was assessable to tax as income of the assessees. On appeal to Supreme Court,

* C.A. Nos. 1425 and 1426 of 1966. 17th April, 1967.

Held that the interest received by the assessees was taxable.

In the determination of compensation, the application of sections 28 and 34 of the Land Acquisition Act, 1894, dealing with the payment of interest on the amount awarded as compensation cannot be deemed excluded. When the owner of property is dispossessed pursuant to an order for compulsory acquisition, an agreement that the acquiring authority will pay interest on the amount of compensation is implied. Clauses (*a*) to (*f*) of section 19 (1) of the Defence of India Act are a Code relating to arbitration in determining the compesation payable to a person deprived of his property. Provisions relating to payment of interest are not, however, part of the law relating to arbitration and there is nothing in clause (*g*) which excludes the application of the substantive law relating to payment of interest when the arbitration is determining the amount of compensation. Therefore the right to interest arose by virtue of the provisions of sections 28 and 34 of the Land Acquisition Act, 1894 and the arbitrator and the High Court merely gave effect to that right in awardng interest on the amount of compensation.

The principle laid down by the Supreme Court in *Dr. Shamlal Narula's case*, (1964) 2 I.T.J. 143 : (1964) 2 S.C.J. 345 : (1964) 7 S.C.R. 668 : (1964) 53 I.T.R. 151 : A.I.R. 1964 S.C. 1878 that " if the source of the obligation imposed by the statute to pay interest arises because the claimant is kept out of his money, the interest received is chargeable to tax as income.", would apply if interest is pyable under the terms of an agreement and the Court or the arbitrator gives effect to the terms of the agreement—Express or implied—and awards interest which has been agreed to be paid.

Appeals by Special Leave from the Judgment and Order dated the 29th October, 1962, of the Madras High Court in Tax Case No. 195 of 1960.*

S. Swaminathan and *R. Gopalakrishnan*, Advocates, for Appellant (In both the Appeals).

T. V. Viswanatha Iyer, Senior Advocate (*T.A. Ramachandran*, Advocate, and *S.P. Nayyar*, Advocate, for *R.N. Sachthey*, Advocate, with him), for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Shah, J.—The Income-tax Appellate Tribunal submitted two questions for the opinion of the High Court of Madras :

" (1) Whether the sum of Rs. 1,28,716 is assessable as income under any of the provisions of the Act ?

2. If the answer is in the affirmative, the assessment years in which the amount falls to be assessed by suitable apportionment."

The first question was answered by the High Court in the affirmative. The High Court declined to answer the second question because it did not, in their view, arise out of the order of the Tribunal. The assessees have appealed to this Court.

By order dated 30th January, 1944, the Collector of Madras, exercising power under rule 75-A of the Defence of India Rules, 1939, requisitioned a property known as "Lutterals Gardens" belonging to the assessees. The property continued to remain under requisition till it vested in the Government of Madras absolutely in consequence of an order made on 24th May, 1949, by the Collector of Madras under section 5 of the Requisitioned Land (Continuance of Powers) Act, 1947, declaring the intention of the Government of Madras to acquire that property. The assessees declined the offer made by the Collector to pay Rs. 2,40,000 as compensation for acquisition of the property and interest at the rate of 6 per cent. thereon from the date of notification for acquisition, and the dispute relating to compensation payable to the assessees was referred to the Chief Judge of the Court of Small Causes, Madras. By order of the High Court of Madras in appeal from the order of the Chief Judge it was adjudged that the assessees be paid Rs. 5,00,000 as compensation for the property. The High Court also awarded interest at the rate of 6 per cent. on the amount of compensation from the date of notification for acquisition.

During the two previous years corresponding to the assessment years 1955-56 and 1956-57 the assessees received, pursuant to the order of the High Court, a total

* (1963) 2 M.L.J. 242 : (1963) 2 I.T.J. 142 : (1964) 52 I.T.R. 867.

sum of Rs. 6,28,716. In proceedings for assessment of tax for the assessment years 1955-56 and 1956-57, the Income-tax Officer apportioned the amount of Rs. 1,28,716 on the basis of actual receipts in the two previous years and assessed the amounts so apportioned to income-tax. The Appellate Assistant Commissioner held that the apportioned amounts were of the nature of revenue and not capital receipts, but in his view the income received was liable to be calculated on accrual basis year after year from the date of the notification for acquisition, and on that account the assessments of the previous years from 1950-51 to 1954-55 should be reopened and the interest which accrued in those years should be assessed.

The Commissioner of Income-tax and the assessees appealed to the Appellate Tribunal against the order of the Appellate Assistant Commissioner. The assessees submitted that Rs. 1,28,716 received as interest being part of compensation were not assessable to tax, whereas the Commissioner claimed that the Income-tax Officer was justified in assessing the amounts in the years in which they were received. The Income-tax Appellate Tribunal accepted the contention of the assessees that the receipts were not assessable to tax becase they were of the nature of capital receipts. At the instance of the Commissioner, the Tribunal referred the two questions set out hereinbefore.

Section 5 of the Requisitioned Land (Continuance of Powers) Act, 1947 authorises the Government by which or under the authority of which land has been requisitioned, to acquire the land subject to requisition, by publishing a notice to the effect that the Government has decided to acquire such land. Section 6 of the Act provides, *inter alia*, that compensation payable to the owner of the land shall be determined in accordance with the provisions of section 19 of the Defence of India Act, 1939, and the rules made thereunder. Section 19 of the Defence of India Act, 1939, sets out the principles for determining the compensation payable to a claimant. The amount of compensation may be fixed by agreement between the owner and the Government : where no such agreement is reached the Central Government is enjoined to appoint an arbitrator having the qualifications prescribed therein. Under section 19 (1) (*e*) the arbitrator in making his award must have regard, *inter alia*, to the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, in so far as the same can be made applicable. An appeal lies against the award of the arbitrator to the High Court. Sub-sections (2) and (3) of section 19 confer upon the Central Government authority to frame rules for the purpose of carrying into effect the provisions of section 19. In exercise of that power, the Government of India framed "The Defence of India (Payment of Compensation and Arbitration) Rules, 1943" which amongst other provisions directed that the Collector shall pay compensation as soon as may be practicable. But neither section 19 (1) of the Defence of India Act, nor the Rules framed under section 19 (2) and (3) provide that interest shall be paid on the amount of compensation ; in the present case, interest was, however, offered to be paid by the Collector ; and the High Court also awarded interest on the amount of compensation from the date of the notification of acquisition.

It was held by this Court in *Dr. Shamlal Narula* v. *Commissioner of Income-tax-Punjab, Jammu and Kashmir, Himachal Pradesh, and Patiala*[1] that the statutory interest daid under section 34 of the Land Acquisition Act, 1894, on the amount of compensa, tion awarded from the date on which the Collector has taken possession of land compulsorily acquired under the Land Acquisition Act, 1894, is interest paid for delayed payment of the compensation and is a revenue receipt liable to tax under the Income-tax Act. It was observed in that case at page 156 :

"* * * * interest, whether it is statutory or contractual, represents the profit the creditor might have made if he had the use of the money or the loss he suffered because he had not that use. It is something in addition to the capital amount, though it arises out of it. Under section 34 of the Act when the legislature designedly used the word 'interest' in contradistinction to the amount awarded, we do not see any reason why the expression should not be given the natural meaning it bears.

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1. (1964) 2 I.T.J. 143 : (1964) 2 S.C.J. 345 : A.I.R. 1964 S.C. 1878. (1964) 7 S.C.R. 668 : (1964) 53 I.T.R. 151 (S.C.):

The scheme of the Act and the express provisions thereof establish that the statutory interest payable under section 34 is not compensation paid to the owner for depriving him of his right to possession of the land acquired, but that given to him for the deprivation of the use of the money representing the compensation for the land acquired."

Counsel for the assessee however contended that the principle of *Dr. Shamlal Narula's case*[1] is not applicable to this case, since there is no provision in the Requisitioned Land (Continuance of Powers) Act, 1947, and the Defence of India Act, 1939, and the rules framed thereunder for payment of interest on the amount of compensation. Counsel said that under the Act, the owner is paid not the market value of the property; but compensation determined in accordance with a highly artificial scheme, and that the interest paid in truth bears the same quality as compensation for deprivation of property and is on that account a capital receipt not exigible to tax. In support of his contention, Counsel invited our attention to two decisions : *The Commissioners of Inland Revenue* v. *Ballantine*[2] and *Simpson (H.M. Inspector of Taxes)* v. *Executors of Bonner Maurice as Executor of Edward Kay*[3].

In *Ballantine's case*[2] a claim of a firm of contractors against a railway company for " additional costs, loss and damage" was referred to arbitration. The arbitrator awarded to the claimant a sum of money mainly as damages, together with interest thereon at 5 per cent. per annum from the date of lodgment of claim until payment. The Revenue sought to charge the interest paid by the railway company to tax under Case III of Schedule D of the Income-tax Act, 1918. It was held that the sum added in the name of interest was part of damages, and was not " interest of money " chargeable to income-tax under Case III of Schedule D. Lord President Clyde observed :

"Now it is familiar that an assessment of the kind may contain as one of its constituent elements an allowance in respect that the claimant has lain for a long time out of his remedy. The propriety of such an allowance may depend on the character of the claim, and its amount may depend on many considerations of which time is only one. But an interest calculation is a natural and legitimate guide to be used by an arbiter in arriving at what he thinks would be a fair amount. In most cases in which such an allowance is a constituent of an award it does not separately appear, but is slumped along with other elements in the gross sum decerned for ; but there is nothing to prevent an arbiter, if he thinks it just and reasonable in a particular case, to make the allowance in the form of an actual interest calculation from a past date until the sum fixed as at that date is paid. In all such cases, however—whether the allowance is wrapped up in a slump award or is separately stated in the decree —the interest calculation is used in *modum aestimationis* only. The interest is such merely in name, for it truly constitutes that part of the compensation decerned for which is attributable to the fact that the claimant has been kept out of his due for a long period of time. It is not therefore ' interest of money' chargeable under Case III of Schedule D."

In *Simpson* v. *Executors of Bonner Maurice as Executor of Edward Kay*[3], the executors of Kay, a naturalised British subject, who died during the First World War received, as the result of the peace treaty claims, amounts representing partly capital of securities, stocks and shares in banks in Germany deposited by Kay; partly interest and dividends ; and partly compensation under the Peace Treaty. In a proceeding for assessment of the receipt to tax it was held that the compensation computed on the basis of interest was not income for the purposes of income-tax. Lord Hanworth, M. R., observed at page 601 :

" I want to add now one more word in reference to the sum which has been paid by way of compensation under Article 297. It is said in reference to that ' that, at least, arose at the time when it was paid under the order of the Mixed Arbitral Tribunal.' It was a sum which was calculated as ' interest '— * * * ' and it is interest, and therefore it is within the words of the Schedule, which undoubtedly impose a tax upon interest which arises or accrues to a person liable to tax.' But is it interest ? Is that its quality, or is it compensation estimated and measured in terms of interest ? It appears to me quite clear that, apart from Article 297, no such sum could have been recovered."

Lawrence, L.J., observed at page 605 :

" Neither the fact that the compensation was measured by the amount of the interest, which but for the embargo placed upon the money by the German Government could have been earned by the respondents, nor the fact that part of the compensation was described as ' interest ' in the decision of the Mixed Arbitral Tribunal, in my judgment, has the effect of altering the character of the compensation paid to the respondents."

1. (1964) 2 I.T.J. 143: (1964) 2 S.C.J. 345: (1964) 7 S.C.R. 668 : (1964) 53 I.T.R. 151 (S.C.); A.I.R. 1964 S.C. 1878.
2. (1924) 8 T.C. 595.
3. (1929) 14 T.C. 580 (C.A.).

But it must be noticed that liability to pay interest arose in *Ballantine's case*[1] under the award of the arbitrator and in the *Executors of Bonner Maurice as Executor of Edward Kay's case*[2], under the order of the Mixed Arbitral Tribunal, and in each case it was held that what was paid, though called " interest", was in truth compensation for loss suffered on account of deprivation of property. According to the view taken by this Court in *Dr. Shamlal Narula's case*[3], if the source of the obligation imposed by the statute to pay interest arises because the claimant is kept out of his money, the interest received is chargeable to tax as income. The same principle would apply if interest is payable under the terms of an agreement and the Court or the arbitrator gives effect to the terms of the agreement—express or implied—and awards interest which has been agreed to be paid.

It is therefore necessary to determine whether the obligation to pay interest awarded under the order of the High Court of Madras arose out of the statute or out of the award. In *Satinder Singh and others* v. *Amrao Singh and others*[4], lands forming part of Cis-Sutlej Jagir were compulsorily acquired under the East Punjab Acquisition and Requisition of Immovable Property (Temporary Powers) Act, 1948. The claimants to the lands claimed in addition to statutory compensation interest from the date from which they were dispossessed and till the date of payment of compensation. The arbitrator appointed under the Act awarded interest on the amount of compensation and the High Court of Punjab in appeal confirmed the order. This Court held that the claimants were entitled to interest on the compensaion amount from the date of dispossession till the date on which the amount of compensation was paid to the claimants. Section 5 of the East Punjab Acquisition and Requisition of Immovable Property (Temporary Powers) Act, 1948, set out the principles according to which compensation was to be paid in regard to the acquired property, and by clause (*e*) thereof it was provided that the arbitrator in making the award shall have regard to the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, in so far as the same may be applicable. The Act contained no express provision for payment of interest on compensation determined by the arbitrator. This Court rejected the contention of the State of Punjab, that sections 28 and 34 of the Land Acquisition Act which dealt with the payment of interest were not intended to apply to the proceedings before the arbitrator. It was observed :

" Stated broadly the act of taking possession of immovable property generally implied an agreement to pay interest on the value of the property and it is on this principle that a claim for interests made against the State."

The Court further observed :

" It would thus be noticed that the claim for interest proceeds on the assumption that when the owner of immovable property loses possession of it he is entitled to claim interest in place of right to retain possession. The question which we have to consider is whether the application of this rule is intended to be excluded by the Act of 1948, and as we have already observed, the mere fact that section 5 (*e*) of the Act makes section 23 (1) of the Land Acquisition Act of 1894 applicable we cannot reasonably infer that the Act intends to exclude the application of this general rule in the matter of the payment of interest."

The Court also observed :

" When a claim for payment of interest is made by a person whose immovable property has been acquired compulsorily he is not making claim for damages properly or technically so-called ; he is basing his claim on the general rule that if he is deprived of his land he should be put in possession or compensation immediately ; if not, in lieu of possession taken by compulsory acquisition interest should be paid to him on the said amount of compensation."

The scheme of the East Punjab Acquisition and Requisition of Immovable Property (Temporary Powers) Act, 1948 is similar to the scheme of the Requisitioned Land (Continuance of Powers) Act, 1947. The Court in *Satinder Singh's case*[4] held that because of the injunction expressly to apply the provisions of section 23 (1) of the Land Acquisition Act, 1894, in the determination of compensation, the application of sections 28 and 34 dealing with the payment of interest on the amount awarded

1. (1924) 8 T.C. 595.
2. (1929) 14 T.C. 580 (C.A.).
3. (1964) 2 I.T.J. 143 : (1964) 2 S.C.J. 345 : (1964) 7 S.C.R. 668 : (1964) 53 I.T.R. 151 (S.C.) : A.I.R. 1964 S.C. 1878.
4. (1961) 2 S.C.J. 372 : (1961) 3 S.C.R. 676 : A.I.R. 1961 S.C. 908.

as compensation cannot be deemed excluded. The Court also held that when the owner of property is dispossessed pursuant to an order for compulsory acquisition, an agreement that the acquiring authority will pay interest on the amount of compensation is implied.

The reasoning on which the right of the owner of the lands acquired to interest was affirmed in *Satinder Singh's case*[1], *prima facie*, applies in this case. Counsel for the assessees contended that the application of sections 28 and 34 of the Land Acquisition Act in proceedings for arbitration under the Requisitions Lands (Continuance Powers) Act, 1947, was expressly excluded by section 19 (1) (*g*) of the Defence of India Act which enacted that :

" Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitration under this section."

But clause (*g*) is not susceptible of any such interpretation. Clauses (*a*) to (*f*) of section 19 (1) are a Code relating to arbitration in determining the compensation payable to a person deprived of his property. Provisions relating to payment of interest are not, however, part of the law relating to arbitration and there is nothing in clause (*g*) which excludes the application of the substantive law relating to payment of interest when the arbitration is determining the amount of compensation.

We are therefore of the view that the principle on which *The Commissioners of Inland Revenue* v. *Ballantine*[2] and *Simpson* (*H.M. Inspector of Taxes*) v. *Executors of Bonner Maurice as Executor of Edward Kay*[3] were based has no application to this case. It may be recalled that in those cases the arbitrator and the Arbitral Tribunal were in awarding interest, not seeking to give effect to or to recognize a right to interest, conferred by statute or contract. The source of the right to interest in both the cases did not arise from the statute or agreement. In the case on hand, the right to interest arose by virtue of the provisions of sections 28 and 34 of the Land Acquisition Act, 1894, and the arbitrator and the High Court merely gave effect to that right in awarding interest on the amount of compensation. Interest received by the assessee was therefore properly held taxable.

The appeals fail and are dismissed with costs. One hearing fee.

T.K.K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, *Chief Justice*, J. C. SHAH, J. M. SHELAT, V. BHARGAVA AND G. K. MITTER, JJ.

The State of Andhra Pradesh and another, etc. .. *Appellants**

v.

Nalla Raja Reddy and others, Etc. .. *Respondents.*

Advocate-General for the State of Mysore .. *Intervener.*

Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act (XXII of 1962) *as amended by Andhra Pradesh Act (XXIII of* 1962), *sections* 3 *and* 4—*Land revenue—Rationalization—Additional levy on wet and dry lands—Basis of assessment—Abandonment of* taram *principle—Adoption of new basis—Extent of* ayacut, *main basis—No provision for machinery of assessment—Statute, whether discriminatory.*

Constitution of India (1950), *Article* 14—*Equality clause—Fiscal statutes—Permissible classification—Extent of.*

Under the Ryotwari system followed from time immemorial in Andhra and Telengana areas, land revenue, which was a share of the produce of the land commuted in money value, varied according to the classification of soil based upon its productivity. Under the Ryotwari system, soils of similar grain values wre bracketed together in orders called " *Tarams*" or " *Bhagana*", and the rates

1. (1961) 2 S.C.J. 372 : (1961) 3 S.C.R. 676 : A.I.R. 1961 S.C. 908.
2. (1924) 8 T.C. 595.
3. (1929) 14 T.C. 580.

*(C.As. Nos. 40 to 46, 48 to 68, 70 to 74 and 76 to 86 of 1966). 28th February, 1967.

were further adjusted in the dry lands having regard to the grouping, and in the wet lands having regard to the water supply.

The Ryotwari Settlements were abandoned in the year 1939. The Andhra Pradesh Land Revenue Assessment (Standardization) Act, 1956 and the Hyderabad Land Revenue (Special Assessment) Act, 1952, were passed in order to standarize the rates on the basis of price level. The Land Revenue Reforms Committee appointed by the State in 1958 to examine the question, did not recommend Ryotwari Settlements, but suggested that assessments should be based on the quality and productivity of soils, the duration of supply of water and the prices. The Committee did not make *ayacut* the basis of the assessment.

Thereafter the Andhra Pradesh Legislature enacted the Andhra Pradesh (Additional Assessment) and Cess (Revision) Act, 1962, and subsequently amended it in the same year to provide for the levy of additional assessment on certain classes of land in the State and for the revision of the assessments leviable in respect of such lands and matters connected therewith. The avowed object of the legislature was to introduce uniformity and rationalization in the revenue systems of Andhra and Telengana areas.

Under the Act, the classification of the lands is based on the extent of *ayacut* and in the case o classes 1 and 2 groups, of *tarams* are relied upon only for introducing differences in the maximum and minimum rates. But the distinction between different *tarams* in each of the groups was effaced. The minimum flat rates fixed for dry lands as well as for wet lands are based not upon the quality and productivity of the soil, and in the case of wet lands the minimum rate is mainly founded on the extent of the *ayacut*. This Act, was challenged as discriminatory and inconsistent with Article 14 of the Constitution. The Andhra Pradesh High Court upheld this challenge. On appeal by the State Government.—

Held, the two tests to ascertain whether a classification is permissible or not are : (1) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group ; and (2) that the differential treatment must have a rational relation to the object sought to be achieved by the statute in question.

A statutory provision may offend Article 14 of the Constitution both by finding differences where there are none and by making no differences where there is one.

These principles are equally applicable to taxing statutes. While the Court may concede a larger discretion to the Legislature in the matter of fiscal adjustment, it will insist that a fiscal statute, just like any other statute, cannot infringe Article 14 by introducing unreasonable discrimination between persons or property either by classification or lack of classification.

The Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, 1962 (as amended) offend Article 14 of the Constitution and hence invalid.

Sections 3 and 4 of the Act in fixing the minimum flat rate for dry or wet lands, have ignored the well established *taram* principles ; and in the case of the wet lands an attempt had been made to classify different systems on the basis of the *ayacuts*, but the said test is unreasonable and has no relation to the objects sought to be achieved, namely, imposition of fair assessments and rationalisation of the revenue assessment structure. An arbitrary method has been introduced displacing one of the most equitable and reasonable methods adopted all these years in the revenue administration of that State.

Under the Act there is no procedure for assessment and however grievous the blunder made, there is no way for the aggrieved party to get it corrected. Under section 6 of the Act the additional assessment payable under the Act shall be treated as land revenue. *Ex facie* this provision has nothing to do with the procedure for assessment, but the assessment payable is treated as land revenue. It is not also possible to read into the section the entire gamut of the Standing Orders of the Board of Revenue.

Appeals from the Judgment and Order dated the 2nd September, 1965 of the Andhra Pradesh High Court in Writ Petitions Nos. 96, 281, 303, 836, 1029, 1130, 1219 and 1497 of 1963, and 79, 94, 111, 112, 141, 142, 148, 149, 159, 167, 171, 172, 173, 183, 256, 267, 386, 443, 491, 497, 549, 571, 591, 611, 616, 646, 680, 695, 700, 720, 725, 737, 760, 1148, 1464 and 1789 of 1964 respectively.

S. V. Guta, Solicitor-General of India (*A. V. Rangam*, Advocate, with him), for Appellants (In C. A. No. 40 of 1966).

P. Ram Reddy, Senior Advocate, (*A. V. V. Nair* and *A. V. Rangam*, Advocates, with him), for Appellants in C. As. Nos. 41 to 46, 48 to 68, 70 to 74 and 76 to 86.

P. A. Choudhury, Advocate, and *R. Thiagarajan*, Advocate for *K. Jayaram*, Advocates, for Respondents Nos. 1 to 12, 14 to 19, 21 to 40, 42 to 57, 59 to 113, 115, 116, 118 to 143, 145 to 156, 159 to 168, 170, 172 to 175, 177 to 186, 188, 190 to 195, 197 to 219, 221, 223 to 233, 235 to 240, 242 to 259, 261 to 330, 332 to 381, 384 to 387, 389 to 391, 393 to 445, 447 to 453, 455 to 472, 474 to 476, 479 to 485, 494 to 514 and 556 (In C.A. No. 48 of 1966) and Respondents Nos. 1, 4 to 21, 23 to 36, 38 to 43, 45 to 55, 57 to 62, 64 to 76, 79, 80, 82, 83, 85, 87 to 92, 94, 96 to 99, 101 to 104, 106, 108, 109, 111 to 157, 159 to 198, 200, 202 to 207, 209 to 212, 214 to 219, 221 to 272, 274 to 277, 279 to 299 and 301 to 324 (In C. A. No. 57 of 1966).

K. B. Krishnamurthy, K. Rajendra Chaudhuri and *K. R. Chaudhuri*, Advocates, for Respondent No. 1 (In C.A. No. 42 of 1966), Respondents (In C.A. No. 45 of 1966), Respondents Nos. 1 to 80, 82 to 96, 98 to 129, 132 to 150, 152 to 207, 209 and 210 (In C. A. No. 46 of 1966), and Respondents Nos. 1 to 29 and 31 to 110 (In C. A. No. 68 of 1966).

K. R. Chaudhuri and *K. Rajendra Chaudhuri*, Advocates, for Respondents Nos. 1 to 7 and 9 (In C. A. No. 53 of 1966), Respondents Nos. 1 to 3, 5 to 9, 11, 12, 14, 17 to 21, 23 and 24 (In C.A. No. 54 of 1966), and Respondents Nos. 1, 2, 4 to 9, 11 to 16, 19 to 28, 30 to 33, 35 to 150, 152, 153, 155, 157, 197, 199 to 328, 330 to 357, 359 to 360 and 362 to 535 (In C. A. No. 44 of 1966).

G. S. Rama Rao, Advocate, for Respondent (In C. A. No. 66 of 1966).

B. R. L. Iyengar, Senior Advocate, (*S. P. Nayar*, Advocate, for *R. H. Dhebar*, Advocate, with him), for Intervener.

The Judgment of the Court was delivered by

Subba Rao, C. J.—These 44 appeals by certificate are preferred against the common judgment of a Division Bench of the Andhra Pradesh High Court allowing the petitions filed by the respondents under Article 226 of the Constitution for directing the State of Andhra Pradesh and other appropriate authorities to forbear from collecting the assessment of land revenue under the provisions of the Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, 1962 (XXII of 1962) hereinafter called the Principal Act, as amended by the Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision (Amendment) Act, 1962 (XXIII of 1962), hereinafter called the Amending Act. For convenience of reference the Principal Act as amended by the Amending Act will be called in the course of the judgment as " the Act". The appellants raised the question of the constitutional validity of the relevant provisions of the Act.

The Principal Act was passed on 27th September, 1962, and it came into force on 1st July, 1962 ; and the Amending Act was passed on 24th December, 1962, and it came into force on 1st July, 1962. We are concerned in these appeals only with the Act, *i.e.*, Principal Act as amended by the Amending Act.

It is said that the main object in passing the Principal Act was to rationalize the land revenue assessment in the State by bringing uniformity between Telengana and Andhra areas and to raise the rate of revenue in view of the rise in prices and to make the ryots bear equitably their share of the burden of the plans. With that view, as the long title of the Principal Act indicates, the said Act was passed to provide for the levy of additional assessment on certain classes of land in the State of Andhra Pradesh and for the revision of the assessments leviable in respect of such lands and matters connected therewith. The relevant provisions of the Act, *i.e.*, the Principal Act as amended by the Amending Act, read thus :

" *Section* 3.—In case of dry land in the State, an additional assessment at the rate of seventy-five per cent of the assessment payable for a fasli year for that land shall be levied and collected by the Government from the person liable to pay the assessment for each fasli year in respect of that land :

Provided that the additional assessment together with the assessment payable in respect of any such land shall in no case be less than fifty naya paise per acre per fasli year.

Section 4.—In the case of wet land in the State which is served by a Government source of irrigation specified in classes I, II and III of the Table below, an additional assessment at the rate o

one hundred per cent and in the case of wet land in the State which is served by a Government source of irrigation specified in Class IV thereof, an additional assessment at the rate of fifty per cent. of the assessment payable for a fasli year for that land shall be levied and collected by the Government from the person liable to pay the assessment for each fasli year in respect of that land :

Provided that the additional assessment together with the assessment payable per acre per fasli year for any wet land specified in column (1) of the Table below shall, in no case, be less than the minimum, or exceed the maximum, specified in the corresponding entry against that land—

(*a*) in column (2) of the Table in the case of a single crop wet land, and

(*b*) in column (3) of the Table in the case of a double-crop wet land.

THE TABLE.

Description of Wet Land			Rate of assessment payable for single crop wet land, per acre		Rate of assessment payable for double crop wet land, per acre	
1			2		3	
Class of and extent of ayacut under Government source of irrigation	Number of settlement taram	Settlement classification or Bhagana	Minimum	Maximum	Minimum	Maximum
(a)	(b)	(c)	(a)	(b)	(a)	(b)
			Rs. nP.	Rs. nP.	Rs. nP.	Rs. nP.
I. 30,000 acres and above	(*a*) 1 to 5	16 to 12	20.00	24.00	30.00	36.00
	(*b*) 6 to 8	11½ to 9	15.00	18.00	22.50	27.00
	(*c*) 9 and above	8½ and below	12.00	15.00	18.00	22.50
II. 5,000 acres and above but below 30,000 acres	(*a*) 1 to 5	16 to 12	15.00	18.00	22.50	27.00
	(*b*) 6 and above	11½ and below	12.00	15.00	18.00	22.50
III. 50 acres and above but below 5,000 acres	All tarams	All bhaganas	9.00	14.00	23.50	21.00
IV Below 50 acres	All tarams	All bhaganas	6.00	12.00	9.00	18.00

Explanation—In this Table,—

(*a*) The expression 'Government source of irrigation' does not include a well, spring channel, parrekalava or cross-bunding ;

(*b*) taram and bhagana classification shall be as registered in the revenue and settlement records :

(*c*) where no such taram or bhagana classification is recorded, in the revenue and settlement records in respect of any land, that land shall be deemed to bear the taram or bhagana classification which a similar land in the vicinity bears.

Section 8.—(1) The District Collector, shall, from time to time, by notification published in the Andhra Pradesh Gazette and the District Gazette, specify the Government sources of irrigation falling under classes I, II and IV of the Table under section 4 and may in like manner, include in, or exclude from, such notification any such source.

(2) Any person aggrieved by a notification published under sub-section (1) may, within forty-five days from the date of publication of the notification in the Andhra Pradesh Gazette and the District Gazette, prefer an appeal to the Board of Revenue whose decision thereon shall be final."

We will analyse the provisions of the said section at a later stage of the judgment. The High Court in deciding against the constitutional validity of the said provisions gave in effect the following findings : (1) Under section 3 of the Act there is no classification at all in the case of dry lands. (2) The ayacut basis adopted in the Table under section 4 of the Act has no rational relation to the taram or quality of the land or the nature of the irrigation source. (3) The minimum fixed by the proviso in many cases is more than 100 per cent increase fixed by the section and thus the proviso has exceeded the section. (4) The Act is silent as to the machinery for making the assessment, the criteria for fixation of the assessment within the range of a fixed

maximum and a minimum, the rights and remedies of the assessees and the obligation of the Government to survey the lands. In short, the High Court struck down the said provisions on the ground that they offend Articles 14 and 19 of the Constitution for three reasons, namely (*i*) in the case of dry lands there is no reasonable classification at all as the flat minimum rate of 50 nP. per acre has no relation to the fertility of the land, (*ii*) in regard to wet land there is no reasonable relation between the quality of the land and the ayacut to which it belongs, and (*iii*) the procedure prescribed for the ascertainment of the rate is arbitrary and uncontrolled. The High Court, though it elaborately considered the question whether the revenue assessment was by authority of law within the meaning of Article 265 of the Constitution, did not express a final opinion thereon.

Mr. S. V. Gupte, learned Solicitor-General, who appeared in one of the appeals filed by the State, contended broadly that the High Court went wrong in coming to the conclusion that the revenue assessment made under the Act had no reasonable relation to the quality of the soil and pointed out that what the Legislature did was nothing more than imposing a surcharge on previous rates fixed on the basis of tarams in the case of lands in Andhra and bhagana in the case of lands in Telengana.

Mr. P. Ram Reddy, learned Counsel for the State in the other appeals, while adopting the arguments of the learned Solicitor-General, argued in a greater detail contending that though the classification under section 4 of the Act was apparently based upon ayacut, there was a correlation between the extent of the ayacut and the duration of water supply and that on that basis the classification could be sustained as it had a reasonable relation to taram or bhagana, as the case may be, and also to the duration of water supply. He took us through various statistical data to support the said connection between the extent of ayacut and the duration of water supply. On the question whether there was any procedure for assessment, he strongly relied upon section 6 of the Act and contended that the said section, by reference incorporated the pre-existing procedure for assessment in Andhra under the Board's Standing Orders and in Telengana under the relevant Acts.

Mr. P. A. Chowdhury, learned Counsel for some of the respondents, argued that from time immemorial land assessment, both in Andhra and in Telengana, was scientifically settled on the basis of taram or bhagana, as the case may be, depending upon the quality and the productivity of the soil and that the Act in adopting the maximum and the minimum rates in respect of both dry and wet lands had ignored the said basis and instead adopted a thoroughly arbitrary method of fixing rates on the basis of ayacut which had no relevance at all to the quality or productivity of the land in respect of which a particular assessment was made. He further contended that the Act omitted the entire machinery for assessment which would be found in almost every taxation statute and conferred an arbitrary and uncanalized power on the appropriate authority to impose assessments and contended that the want of reasonable relation between the quality and fertility of the soil and the ayacut and the conferment of arbitrary power of assessment would infringe the doctrine of equality enshrined in Article 14 of the Constitution, both in its substantive and procedural aspects.

Mr. Krishnamurthy, learned Counsel appearing for the respondents in some of the appeals, advanced an additional argument in respect of lands fed by Yeleru river, *viz.*, that in any event the Act would not apply to the said land as they did not fall under any of the 3 categories covered by the Act, namely, dry land, single-crop wet land and double-crop wet land and that, therefore, no assessment under the Act could be imposed in respect of the said lands.

Before we consider the said arguments it would be necessary to know briefly the nature and scope of the previous revenue settlement in Andhra and Telengana. After some experiments in the Madras State it was decided in 1863 that a general revision of assessment should be made based on accurate survey and classification of soils. This is known as Ryotwari Settlement. The Ryotwari Settlement was conducted in seven stages : (1) demarcation of boundaries, (2) survey, (3) inspection (4) classification of soils, (5) assessment, (6) matters subsequent to assessment, and

(7) records of settlement. The first two items were done by the Survey Department and the items Nos. 3 to 7 by the Settlement Department. It will be enough for the purposes of these appeals if we describe briefly how this classification of soils was done and the assessment made on that basis. Before proceeding to the detailed classification of soils in each village, there was a preliminary grouping of villages so as to bring together those which were similarly situated having regard to proximity to market, facility of communication and climate. Thereafter the soil was classified into "series", such as (1) Alluvial islands in rivers and permanently improved soils; (2) Regar or regada, the so-called "black cotton soil", (3) Red ferruginous soil ; (4) Calcareous-chalk or lime and ; (5) Arenaceous. Every soil of the said series was again divided into classes on the basis of the variety and physical situation such as pure clay or half sand or more than 2/3rd sand, etc., The classes were again divided into sorts such as good or bad or ordinary or worst. Briefly stated, land was classified into series, series into classes, and classes into sorts. In the case of wet land in addition to the sorts, other distinctions were borne in mind in grading the soil such as (1) whether the land was close to the irrigation main channel and had good level and drainage ; (2) whether the land was less favourably situated in these respects, (3) whether the land was imperfectly supplied with water; or whether the level was inconvenient, and drainage bad, and (4) whether the land was so situated that the water could not be let to flow on to it, but had to be raised by balng it out. After the said classification the next stage was to ascertain the amount of crops each different class and sort of soil could produce. After deducting the cost of cultivation the net produce was valued in money and the said amount was divided into proper percentages. One such percentage fixed by the Rules would be the Government revenue. On the basis of the classification a table of class and sort-called Taram, which would apply equally to several soils was drawn up. We have gathered the necessary particulars from " Land Systems of British India " by Baden Powell, Vol. 3.

The principles of settlement of ryotwari land and the manner the Government demand was arrived at is found in the Standing Orders of the Board of Revenue Vol. I, paras. 1 and 2. They are as follows:

"(*i*) The assessment shall be on the land, and shall not depend upon the description of produce, or upon the claim of certain classes such as Brahmanas, Mahajans, Purakkudis and others to reduced rates.

(*ii*) The classification of soils is to be as simple as possible, and is to be alike everywhere instead of each village having its own ;

(*iii*) The assessment is to be fixed so as not to exceed half the net produce after deducting the expenses of cultivation, etc.

(*iv*) No tax is to be imposed for a second crop on dry land, but wet lands which in all ordinary seasons have an unfalling supply of water for two crops are to be registered as double crop, the charge for the second crop being generally half the first crop assessment. Remission may be given when the supply of water fails. In cases where water is raised by baling, an abatement of half a rupee per acre is allowed :

(*v*) The Tahsildar, or in the course of a resettlement, the Special Settlement Officer or Special Assistant Settlement Officer may allow the charge for second crop to be compounded in respect of all irrigated lands of which the supply of water is not ordinarily unfailing. The rates of composition will be as follows :

For wet land irrigated from a second-class irrigation source, one-third ;

For wet land irrigated from a third-irrigation source, one-fourth :

For wet land irrigated from a fourth-class irrigation source, one-fifth ;

For wet land irrigated from a fifth-class irrigation source, one-sixth.

Where the irrigation is precarious and the supply is supplemented by wells, the divisional officer or in the course of a re-settlement, the Special Settlement Officer, or Special Assistant Settlment Officer, may allow the charge for second crop to be compounded at one-half of the rates referred to above, except under sources grouped in Class 1 or 2 for settlement purposes. Composition at such favourable rates may be allowed to lands for which the charge for second crop has already been compounded at the ordinary rates. If the wells however fall into disrepair, the land should be transferred from compounded double crop to single crop wet. Ryots may be permitted to compound at any time and to any extent even after the settlement.

(2) In carrying out the settlement with reference to the foregoing principles, the Settlement Department divides the soils into certain classes with reference to their mechanical composition, sub-divides them into sorts or grades with reference to their chemical and physical properties and other circumstances affecting their fertility and attaches a separate grain value to each grade after numerous examinations of the actual outturn of the staple products in each class and sort of soil. The grain value is then converted into money at the commutation price, based generally on the average of the 20 non-famine years immediately preceding the settlement, for the whole district, with some abatement for trader's profits and for the distance the grain has usually to be carried to the markets, and from the value of the gross produce thus determined, the cost of cultivation and a certain percentage on account of vicissitudes of season and unprofitable acreas is deducted, and one-half of the remainder is the maximum taken as assessment or the Government demand on the land. After this, soils of similar grain values, irrespective of their classification, are bracketed together in orders called *Tarams*, each with its own rate of assessment. These rates are further adjusted with reference to the position of the villages in which the lands are situated and the nature of the sources of irrigation. For this purpose villages are formed nto groups, in the case of dry lands, with reference to their proximity to roads, and markets, and, in the case of wet lands, with reference to the nature and quality of the water supply. This accounts for different rates of assessment being imposed on lands of similar soils, but situated in different groups or under different classes of irrigation."

The broad principles of Ryotwari system may be stated thus : (1) Under that system the soil itself is taxed and the assessment is fixed on the land ; (2) Lands are classed into two general heads, namely, wet and dry ; (3) The soils of similar grain values are bracketed together in orders called " *Tarams* " each with its own rate of assessment ; (4) The rates are further adjusted, in the case of dry lands, with reference to the nature and quality of water-supply. This system has been followed from time immemorial and had the general approval of the public. It has a scientific basis and throws equitable burden on the different classes of land.

The system followed in Telengana which formed part of the erstwhile Hyderabad State was as follows : - The relative scales of soils in respect of classification was in annas or " annawari ". The existing or the former rates were taken as the basis and were adjusted having regard to altered circumstances, the rise or fall of prices, increase in population , means of support and other advantages. No attempt was made to fix the assessment at a certain fraction of net assets for determining the money value of the produce of the field crop. But experiments were made by the Settlement Officers and with the results obtained therein the rates fixed were checked in order to ascertain what profit would be left to the cultivators.

It will be seen that both in Andhra as well as Telengana area under the Ryotwari system, the land revenue which was a share of the produce of the land commuted in money value varied according to the classification of soil based upon its productivity. Both in Andhra and Telengana areas under the Ryotwari system the soils of similar grain values were bracketed together in orders called " Tarams " or " Bhaganas " and the rates were further adjusted in the dry land having regard to the grouping and in wet lands having regard to the water-supply. But in both the cases, the quality and the grade of the soil divided in " Tarams " or " Bhaganas " as the case may be, was the main basis for assessment.

It appears that the Ryotwari Settlements were abandoned in the year 1939. In the Report of the Land Revenue Reforms Committee of the Government of Andhra Pradesh, Hyderabad at page 30 it is stated :

" Re-settlement operations were never popular with the ryots, as in all cases due to the steady increase in prices, resettlements always led on to an increase in land revenue assessment. They were finally ordered to be abandoned in 1939."

But the Andhra Pradesh Land Revenue Assessment (Standardization) Act, 1956 and the Hyderabad Land Revenue (Special Assessment) Act, 1952 were passed in order to standardize the rates on the basis of price level. They increased the rates by way of surcharge. In the year 1958 the Government of Andhra Pradesh appointed Land Revenue Reforms Committee to examine the existing system and rates of land revenue assessment and irrigation charges obtaining in the various regions of the State and to make suitable recommendations for their rationalisation.

The relevant recommendations of the Land Revenue Reforms Committee of the Government of Andhra Pradesh in regard to fixation of rates are contained in Chapter XV of Part II, Vol. (iii) of its Report. They are :

"*No.* 51. Land Revenue should be fixed as a percentage of the net produce.

No. 53. As periodical settlements or re-settlements are not recommended and as revisions in future will be based on prices and other relevant factors, it is not necessary to give an opinion as to what percentage of the net produce, the share of the Government should be.

No. 71. In future, the assessment on irrigated land should be fixed on the basis of the dry land potential and the charge for irrigation should be on the basis of a charge, for service, by the Government.

No. 72. The productivity of the soils, the capacity of the source based on the duration of supply and the ability of the ryots to bear the charge, are the chief factors which should be considered in determining the water charges.

No. 73. In future, the assessment on irrigated land should consist of dry assessment depending on the quality of soil and the charge for irrigation, based on the quantum of service rendered by the Government. Even though, the income from irrigated land is several times that of dry land, still for the service done, it is not suggested to levy a uniform rate, but graduated rates, related to the soil value of the lands, on which the yields would depend."

It will be seen from the said recommendations that the Committee did not recommend Ryotwari settlements but suggested that assessments should be based on the quality and productivity of soils, the duration of supply of water and the prices. It may be noticed that the Committee did not make ayacut the basis of the assessment.

Let us now analyse the provisions of the Act. Under sections 3 and 4 of the Act and the Table attached to section 4, which have been extracted earlier, a completely new scheme has been laid down. Under section 3, an additional assessment at the rate of 75 per cent. of the earlier assessment is imposed and under the proviso the total assessment should not be less than 50 nP. per acre for a fasli year. That is to say, irrespective of the quality and productivity of the soil, every acre of dry land has to bear a minimum assessment of 50 nP. per acre of a fasli year. Coming to wet lands under the Table appended to section 4, they are divided into 4 categories depending upon the extent of the ayacuts. Ayacuts of 30,000 acres and above fall under the first class, 5,000 acres and above but below 30,000 acres, under the 2nd class, 50 acres and above but below 5,000 acres, under the 3rd class, and below 50 acres, under the 4th class. A maximum and a minimum rate of assessment per acre are fixed for lands under ayacuts under each of the said classes. Further, under class 1 the tarams and bhaganas are divided into 3 groups and different maxima and minima rates of assessment are fixed for each such group. In the 2nd class, tarams and bhaganas are put into two groups and different maxima and minima rates are fixed in respect of the two groups; in classes 3 and 4 no distinction is made on the basis of tarams. Briefly stated, the whole classification is based on the extent of ayacut and in the case of classes 1 and 2 groups of tarams are relied upon only for introducing differences in the maximum and minimum rates. But the distinction between different tarams in each of the groups is effaced without any appreciable reason for such effacement. The minimum flat rates fixed for dry lands as well as for wet lands are not based upon the quality and productivity of the soil and in the case of wet lands the minimum rate is mainly founded on the extent of ayacut.

Prima facie we do not see any reasonable relation between the extent of the ayacut and the assessment payable in respect of an acre of land forming part of that ayacut. The system of periodical ryotwari settlement held by the British Government on a scientific basis of quality and productivity of the soil with marginal adjustments on the foot of the duration of water supply in the case of wet lands and grouping of villages in the case of dry lands was given up. The scheme of surcharge on pre-existing rates, earlier accepted, was not adopted. The recommendation of the Committee that the assessment should be based on the duration of water supply among others was not followed. Instead the Act introduced in the case of both dry and wet lands an unscientific and arbitrary method of assessment imposing a minimum flat rate irrespective of the tarams. In the case of wet lands an additional irrational factor is laid down, *viz.*, the rate is linked with the extent of the ayacut. In the case of wet land, a minimum flat rate with some variations within different groups in classes I and II and a minimum flat rate in respect of the groups in classes III and IV is fixed without any rational connection between the two. Mr. P. A. Choudhury contended that the scheme accepted by the Act was hit by Article 14 of the Consti-

tution inasmuch as it gave up practically the principle of tarams and bhaganas and accepted a flat rate irrespective of the quality and productivity of the land and, therefore, suffered from want of reasonable classification. He further contended that the alleged justification for the classification, namely, the extent of the ayacut, had no reasonable relation to the objects sought to be achieved by the Act, namely, rationalisation of the revenue assessment on land in the entire State.

Mr. P. Ram Reddy, on the other hand, made a strenuous attempt to sustain sections 3 and 4 of the Act on the basis of reasonable classification. He said that in the case of dry land the minimum rate of 50 nP. was so low that in most of the cases 75 per cent. of the previous assessment per acre would not be more than 5 nP., and, therefore, the mere fact that in a few cases the 75 per cent. of the assessment would fall on the other side of the line could not affect the validity of the classification for it would almost be impossible in any scheme of classification to avoid marginal cases. So too in the case of wet lands, he argued, in regard to Classes I and II, the duration of supply of water corresponded to the extent of the ayacut in most of the cases and, therefore, though the classification was based upon the extent of the ayacut, it was really made on the basis of the duration of the water supply. As regards different groupings of the tarams and bhaganas in the first two classes, it was contended that, as the differences between the tarams in each group were not appreciable and, therefore, if the rate of assessment was integrally connected with the duration of the water supply, the said grouping of the tarams would not affect the reasonableness of classifications. In the case of classes II and IV, he contended, that in respect of lands falling under the said two Classes the difference in the rates between the different tarams was not appreciable and, therefore, that could be ignored. In short he maintained that there was an equation between the duration of supply of water and the extent of the ayacut and that the difference in the duration of water supply in the context of assessment of various lands has a reasonable relation to the aforesaid object of the Act sought to be achieved.

Now let us test the contentions of Mr. Ram Reddy with the facts placed before us.

Wet Lands.—Some tabular statements under the headings " average test " and " majority test " have been placed before us in support of the contention. The following are the figures under the " Average test.

" A " Average Test.

S. No.	*Name of Taluk*		*Average for less than 3 months*	*Average for between 3 and 5 months*	*Average for between 5 and 8 months*	*Average for more than 8 months*
1.	Anantapur	..	25.4	50.5	120.8	..
2.	Dharmavaram	..	13.7	49.0	120.1	..
3.	Tadipartri	..	16.4	62.0	126.0	..
4.	Gooty	..	9.5	48.3	152.8	..
5.	Kalyanadurga	..	10.2	52.9	152.5	..
6.	Rayadurg	..	22.0	59.7	162.0	..
7.	Mabakasira	..	15.2	55.4	143.2	..
8.	Penukonda	..	10.9	60.6	186.4	..
9.	Hindupur	..	15.1	58.3	108.7	..
10.	Kadiri	..	9.9	43.9	147.9	..
Average of Taluks		..	14.9	54.1	142.2	

					Average for between 3 and 5 months	Average for between 5 and 8 months
1.	Ichapuram	..	..	..	8.3	69.6
2.	Pathapattanam	..	..	..	24.7	47.4
3.	Chipurapalli	..	..	..	2.5	139.3
4.	Srikakulam	..	..	..	6.4	84.9
5.	Sompeta	..	..	..	6.6	80.8
6.	Salur	..	..	..	13.8	..
7.	Bobbili	..	..	..	19.5	..
8.	Palkonda	..	..	..	..	37.8
9.	Narasannapet	..	..	..	..	35.5
10.	Parathipuram	..	..	..	..	84.2
		..	..	..		
	Average of Taluks	..	..	..	8.2	57.9

S.No.	*Name of Taluk*		*Average for less than 3 months*	*Average for between 3 and 5 months*	*Average for between 5 and 8 months*	*Average for more than 8 months*
1.	Mahabooba	..	4.8	26.8	60.6	..
2.	Mulug	..	25.1	171.6	370.8	6086.46

The averages mentioned under different columns are the average extent of the ayacuts in each taluk correlated with particular months of water supply. If we take the average for less than 3 months in respect of different taluks in the Rayalaseema area, which is part of the Andhra, the extents of the ayacuts vary from 9 acres to 26 acres. In regard to the duration of water supply between 3 and 4 months, they vary from 43 to 62 acres. In regard to the duration of water supply between 5 and 8 months, they vary between 108 and 152 acres. So too in some of the taluks of the Andhra area the same variations are found. It is, therefore, not possible from the average test to hold that particular months of supply corresponded with particular extent of the ayacut.

The following tabular form represents the "Majority test":

"B" Majority Test.

S.No.	*Name of Taluk*		*Below 5 months duration.*		*Between 5 and 7 months*	
			No. of irrigation sources below 50 acres ayacut	*Total No. of irrigation sources*	*No. of irrigation sources between 50 and 5,000 acres*	*Total No. of irrigation sources*
1.	Anantapur	..	15	30	19	19
2.	Dharamavaram	..	23	32	14	14
3.	Tadapatri	..	7	9	1	1
4.	Gooty	..	31	34	5	5
5.	Kalyandrug	..	38	51	14	14
6.	Kayadurg	..	5	9	2	2
7.	Madacasira	..	37	62	25	25
8.	Panukonda	..	54	85	32	32
9.	Hindupur	..	113	155	30	30
10.	Kadiri	..	379	407	18	18

S. No.	Name of Taluk	*Below 5 months duration*		*Between 5 and 8 months.*	
		No. of irrigation sources below 50 acres Ayacut.	*Total No. of irrigation sources.*	*No. of irrigation sources between 50 and 5,000 Acres.*	*Total No. of irrigation sources.*
1.	Ichapuram ..	165	166	35	79
2.	Pathapatnam ..	927	1,054	147	570
3.	Cheepurapalli ..	1,799	1,905	39	39
4.	Srikakulam ..	465	470	127	120
5.	Sompeta ..	1,082	1,099	125	131
6.	Salur ..	594	614	..	..
7.	Bobbili ..	1,629	1,771	..	..
8.	Palkonda ..	..	..	178	290
9.	Narasannapet ..	..	..	192	1,214
10	Paravathipuram Including Karupum Section ..	.. ..	..	135	152
1.	Muhabooba Taluk (P. 1455 to 1437) (upto 10 acres) ..	111	111	90	90
2.	Mulugu Do. ..	179	231	12	12

No. of Irrigation Sources between 5,000 & 30,000 acres for more than 8 months—2

Total No. of Irrigation sources Do. 3

By majority test it is meant to convey that in each taluk the majority of the irrigation sources with a particular duration have a proportionate relation to the different extent of the ayacut mentioned in the Act. But the aforesaid tabular form does not support that assertion. In regard to water sources of below 5 months duration with an ayacut of below 50 acres, a comparison of the first two columns shows that, except in a few cases, the test completely fails. No doubt in regard to irrigation sources supplying water for between 5 and 8 months of ayacut of 5,000 to 50,000 acres, the test appears to be satisfied. But the table itself is confined only to the Rayalaseema area of the Andhra Part of the State and even in regard to that area there is no unanimity, as the test fails in regard to sources within 5 months duration. Similar tests in Srikakulam district which is a part of the Andhra area of the State, shows that in many cases the majority test thoroughly breaks. Nothing can, therefore, be built upon the said tests. Further, the statements filed in the case showing the area irrigated for different durations clearly indicates that in many cases the additional assessment is more than 100 per cent. or 50 per cent., as the case may be, of the original assessment showing thereby that the increase is on the basis of the flat minimum rate and not on the basis of the duration of the irrigation sources. Further water sources which supply water for more than 5 months but less than 8 months and have registered ayacuts below 5,000 acres fall under class IV. Some of the tanks which supply water for more than 8 months fall under different classes having regard to the ayacut which they serve. For instance, Kumbum tank has a registered ayacut of 10,000 acres, Bukksepatnam tank has a registered ayacut of 184 acres ; and though both supply water for 8 months or more, the former falls under class II and the latter under class III. A cursory glance through the statistics of the various districts tells the same tale. In the Warrangal district of the Telengana area, in Mahabooba taluk none of the water sources supplies water for more than 8 months and none of them has an ayacut of more than 175 acres ; they are all classified under class III or class IV. In Malug taluk 3 tanks supply water for more than 8 months and they have ayacuts of 3,400 acres. 1,901 acres and 6,470 acres respectively. The first two fall under clause III and the last under class II. In Anantapur District, 14 out of 22 sources which supply water for between 3 and 5 months are placed under class III. In Dharmavaram taluk, out of 22 water sources of similar nature, 9 fall in class III. In Srikakulam district some of the water sources which supply water for more than 8 months fall under class III, because of their ayacut. The record also discloses that Sitanagaram Anicut system has a registered ayacut of 4,017 acres, Mahadevpuram

tank system has only 1,500 acres, Dondapad tank system has 1,504 acres, Anamsemudram-Biraperu tank system has 826 acres, Jangamanaheswarapuram tank system has only 246 acres, Yerur Tank system has 1,500 acres, and Ponnalur tank system has 987 acres. Under section 4 all these water sources fall under class III It is not necessary to multiply instances. The High Court has carefully considered this aspect. Enough has been said to make the point that classification based on ayacut has no reasonable relation to the duration of water supply. It is, therefore, clear that the ayacuts do not correspond to the number of months of water supply ; indeed, many tanks which supply water for a longer duration have smaller ayacuts. Tanks supplying water for equal durations fall under different classes. In a large number of cases the minimum rate is more than 100 per cent. of the earlier assessment indicating thereby that the minimum rate has no relation to the quality or the productivity of the soil. In short, both sections 3 and 4 in fixing the minimum flat rate for dry or wet lands, as the case may be, have ignored the well established taram principle ; and in the case of wet lands an attempt has been made to classify different systems on the basis of the ayacuts but the said test is unreasonable and has no relation to either the duration of water supply or to the quality or the productivity of the soil. The classification attempted in either case has no reasonable relation to the objects sought to be achieved, namely, imposition of fair assessments and rationalisation of the revenue assessment structure. Indeed, an arbitrary method has been introduced displacing one of the most equitable and reasonable methods adopted all these years in the revenue administration of that State.

The same unreasonableness is writ large on the provisions prescribing the machinery for assessment. The machinery provisions read thus :

Section 6—The additional assessment payable under this Act in respect of any land shall, for all purposes, be treated as land revenue.

Section 8—(1) The District Collector shall, from time to time, by notification published in the Andhra Pradesh Gazette and the District Gazette, specify the Government sources of irrigation falling under classes I, II and IV of the Table under section 4 and may in like manner, include in, or exclude from, such notification any such source.

(2) Any person aggrieved by a notification published under sub-section (1) may, within forty-five days from the date of publication of the notification in the Andhra Pradesh Gazette and the District Gazette, prefer an appeal to the Board of Revenue whose decision thereon shall be final".

Section 8 has nothing to do with the assessment. It only provides for specification of Government sources of irrigation falling under different classes. Therefore, the only provision which may be said to relate to procedure for assessment is section 6. Mr. Ram Reddy argued that section 6 by reference brought into the Act not only the entire provisions of the Andhra Pradesh Revenue Recovery Act but also the elaborate procedure for assessment prescribed by the Standing Orders of the Board of Revenue. He added that section 6 incorporated by reference the Standing Orders of the Board of Revenue relating to procedure and thereby the said Standing Orders were made part of the statute. This argument has been pitched rather high and we do not think that the phraseology of the section permits any such interpretation. Under section 6 the additional assessment payable under the Act shall be treated as land revenue. *Ex facie* this provision has nothing to do with the procedure for assessment ; but the assessment payable is treated as land revenue. An assessment becomes payable only after it is assessed. The section, therefore, does not deal with a stage prior to assessment. The amount payable towards assessment may be recovered in the manner the land revenue is recovered.

For the same reason it is not possible to read into the section the entire gamut of the Standing Orders of the Board of Revenue which deal with the mode of assessment ; for the said machinery also deals with a stage before the assessment becomes due. If it was the intention of the Legislature that the Standing Orders of the Board of Revenue should be brought into the Act by incorporation, it would have certainly used appropriate words to convey that idea. It would not have left such an important provision so vague and particularly when the Legislature may be presumed to know that the question whether the Standing Orders are law was seriously raised in many

proceedings. Therefore, if section 6 is put aside, there is absolutely no provision in the Act prescribing the mode of assessment. Sections 3 and 4 are charging sections and they say in effect that a person will have to pay an additional assessment per acre in respect of both dry and wet lands. They do not lay down how the assessment should be levied. No notice has been prescribed, no opportunity is given to the person to question the assessment on his land. There is no procedure for him to agitate the correctness of the classification made by placing his land in a particular class with reference to ayacut, acreage or even taram. The Act does not even nominate the appropriate officer to make the assessment to deal with questions arising in respect of assessments and does not prescribe the procedure for assessment. The whole thing is left in a nebulous form. Briefly stated, under the Act there is no procedure for assessment and however grievous the blunder made there is no way for the aggrieved party to get it corrected. This is a typical case where a taxing statute does not provide any machinery of assessment.

On the said facts the question is whether sections 3 and 4 of the Act offend Article 14 of the Constitution. The scope of Article 14 has been so well settled that it does not require further elucidation. While the article prohibits discrimination, it permits classification. A statute may expressly make a discrimination between persons or things or may confer power on an authority who would be in a position to do so. Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately. A statutory provision may offend Article 14 of the Constitution both by finding differences where there are none and by making no difference where there is one. Decided cases laid down two tests to ascertain whether a classification is permissible or not, *viz*., (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group ; and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The said principles have been applied by this Court to taxing statutes. This Court in *Kunnathat Thathunni Moopil Nair* v. *The State of Kerala*[1], held that the Travancore-Cochin Land Tax Act, 1955, infringed Article 14 of the Constitution, as it obliged every person who held land to pay the tax at the flat rate prescribed, whether or not he made any income out of the property, or whether or not the property was capable of yielding any income. It was pointed out that that was one of the cases where the lack of classification created inequality. In *East India Tobacco Co*. v. *State of Andhra Pradesh*[2], though this Court again held that taxation laws also should pass the test of Article 14 of the Constitution gave the caution that in deciding whether such a law was discriminatory or not it was necessary to bear in mind that the State had a wide discretion in selecting the persons or things it would tax. The applicability of Article 14 to taxation statute again arose for consideration in *Khandige Sham Bhat* v. *The Agricultural Income-tax Officer*[3] and this Court affirmed the correctness of the decision in *K. T. Moopil Nair's case*[1]. In the context of a taxation law this Court held :

"Though a law *ex facie* appears to treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the Court to scrutinize the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situated differently ; but on investigation they may be found not to be similarly situated. To state it differently, it is not the phraseology of a statute that governs the situation but the effect of the law that is decisive. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine........But in the application of the principles, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legis-

1. (1961) 2 S.C.J. 269 : (1961) 3 S.C.R. 77: A.I.R. 1961 S.C. 552.
2. (1963) 1 S.C.R. 404 : A.I.R. 1962 S.C. 1733.
3. (1963) 1 S.C.J. 140 : (1963) 48 I.T.R. 21 : (1963) 3 S.C.R. 809, 817 : A.I.R. 1963 S.C. 591.

lature to classify is of 'wide range and flexibility' so that it can adjust its system of taxation in all proper and reasonable ways."

It is, therefore, manifest that this Court while conceding a larger discretion to the Legislature in the matter of fiscal adjustment will insist that a fiscal statute just like any other statute cannot infringe Article 14 of the Constitution by introducing unreasonable discrimination between persons or property either by classification or lack of classification. Two decisions relied upon by the learned Counsel for the appellant may now be noticed. In *C.V. Rajagopalachariar* v. *State of Madras*[1], the facts were: two Acts, namely, Madras Land Revenue Surcharge Act (19 of 1954) and Madras Land Revenue (Additional Surcharge) Act (30 of 1955), were passed by the Madras Legislature increasing the land revenue payable by landlords to the extent of the surcharge levied. Those two Acts were questioned, *inter alia*, on the ground that they offended Article 14 of the Constitution ; but the ground of attack was that the Acts fixed a slab system under which the rate of surcharge progressively increased from As. 2 to As. 8 on each rupee of the land revenue paid and that the relevant provision was discriminatory in its operation as a distinction had been made between rich and poor people and as the levy of the tax was different for different classes of owners. That contention, for the reasons given therein, was negatived. In the said Madras Acts a surcharge was imposed in addition to the previous rates and the previous rates had been made on the basis of ryotwari settlements which did not offend Article 14 of the Constitution and, therefore, a small addition to the said rates could not likewise infringe the said article. The present question did not arise in that case. Nor is the decision of the Mysore High Court in *H.H. Vishwasha Thirtha Swamiar of Sri Pejavar Matt* v. *The State of Mysore*[2] in regard to the Mysore Land Revenue Surcharge Act (XIII of 1961) has any bearing on the present question. There, as in the Madras Acts, the revenue surcharge levied was an additional imposition of land tax and, therefore, the Mysore High Court held that it did not offend Article 14 of the Constitution. In holding that Article 14 was not infringed, the Court said :

"We have before us a temporary measure. That is an extremely important circumstance. The State, not unreasonably, proceeded on the basis that a temporary levy could be made on the basis of existing rates. We can think of no other reasonable basis on which the levy could have been made. It may be that in the result some areas were taxed more than others. But yet it cannot be said with any justification that there was any hostile discrimination between one area and another."

It will be seen that in that case on existing rates based upon scientific data a surcharge was imposed as a temporary measure till a uniform land revenue law was enacted for the whole State. That decision, therefore, does not touch the present case. But in the instant case, as we have pointed out earlier, the whole scheme of ryotwari settlement was given up so far as the minimum rate was concerned and a flat minimum rate was fixed in the case of dry lands without any reference to the quality or fertility of the soil and in the case of wet lands a minimum wet rate was fixed and it was sought to be justified by correlating it to the ayacut. Further, the whole imposition of assessment was left to the arbitrary discretion of the officers not named in the Act without giving any remedy to the assessees for questioning the correctness of any of the important stages in the matter of assessment, such as ayacut, taram, rate or classification or even in regard to the calculation of the figures. Not only the scheme of classification, as pointed out by us earlier, has no reasonable relation to the objects sought to be achieved, *viz.*, fixation and rationalisation of rates but the arbitrary power of assessment conferred under the Act enables the appropriate officers to make unreasonable discrimination between different persons and lands. The Act, therefore, clearly offends Article 14 of the Constitution.

In some of the appeals relating to Peddapuram and Kumarapuram villages another point was raised, namely, that a special rate had been fixed which was neither for a single crop nor for a double crop and that, therefore, they do not come under any of the provisions of the Act. In the view we have expressed on the other questions it is not necessary to notice this argument.

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1. (1959) 2 M.L.J. 344 : I.L.R. (1959) Mad. 1073 : A.I.R. 1960 Mad. 543.
2. (1966) 1 Mys. L.J. 351, 359.

In the result the appeals are dismissed with costs. One hearing fee.

ORDER.

At the time when stay was granted by this Court on 16th December, 1965, a condition was imposed upon the appellant in the following terms :

"........Appellants undertaking that in the event of the dismissal of the intended appeals herein the amounts collected under the head of additional charge realised under the provisions of the aforesaid Acts shall be returned or set off according to further orders of this Court........"

Having regard to the circumstances of this case, we think the proper course is to direct the appellant to set off the excess amounts collected towards tax payable for the subsequent year or years.

V. B. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

Sundaram and Company (Private), Ltd., Madurai .. *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 34 (1) (b)—'Assessment at too low a rate' —Rate means a standard or measure—Company—Super-tax—Wrong allowance of rebate—Validity of reassessment proceedings—Finance Act (XVIII 1of 956), section I, Part II, Item D, First and second Provisos.

Words and Phrases—" Excessive relief "—" Too low a rate "—" Rate ".

In respect of the assessment years 1946-47 to 1951-52, the Income-tax Officer passed orders under section 23-A that a sum of Rs. 3,54,716 must be deemed to have been distributed as dividends by the assessee-company. The assessee credited the dividends in the accounts of the shareholders in pursuarce of the resolution dated 7th July, 1955. For the assessment year 1956-57 after the income was determined, super-tax and rebate were computed under the Finance Act of 1956, the Officer sought to reopen assessment under section 34 (1) (*b*) of the Act on the ground that the assessee had obtained excessive relief by the wrong application of the provisions of Finance Act of 1956. A reduction of the rebate was applied by the Officer in respect of a sum of Rs. 4,32,325 which according to the Officer was the deemed distribution of dividend under section 23-A. The Appellate Assistant Commissioner upheld the validity of the initiation of back assessment but held as the sum of Rs. 3,54,716 were deemed distribution of dividend in respect of the prior years, the rebate could be withdrawn only in respect of a sum of Rs. 77,600. The Tribunal in the appeal at the instance of the department, while holding that section 34 (1) (*b*) was not at all applicable, yet sustained the order of the Appellate Commissioner. The High Court in reference held that the ground of excessive relief could not support reassessment and held that the ground of assessment at too low a rate could be urged but did not record any answer on that aspect. The assessee appealed.

Held, that the chief aim and object of the Finance Act of 1956 is to prescribe the standard or measure of income-tax and super-tax and an assessee escaping some of its provisions and failing to pay the full measure of tax is assessed to too low a rate within the scope of section 34 (1) (*b*) of the Act.

The assumption that the expression " rate" has been used in section 34 (1) as meaning a fraction of total income is not warranted. By the use of the expression " rate" in the context in which it occurs, undoubtedly a relation between the

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*C.A. No. 2453 of 1966. 25th April, 1967.

taxable income and the tax charged is intended, but the relation need not be of the nature of proportion or fraction. The expression "rate" is often used in the sense of a standard or a measure. Provided that tax is computable by the application of a prescribed standard or measure, though not directly related to taxable income, it may be called tax computed at a certain rate. The rebate of tax and the reduction of such rebate are essentially matters of measure or standards of rate.

Where the question of law arising out of the order of the Tribunal was the validity of initiation of proceedings under section 34 (1) (*b*) of the Act, the questions of reassessment on the ground, income had been the subject of excessive relief and income had been assessed at too low a rate would be only different aspects of the same question. The High Court can deal with an aspect of the question of law though that aspect was not argued before the Tribunal.

On facts : the High Court on remand has to determine whether the proceedings were validly initiated.

Appeal from the Judgment and Order dated the 9th August, 1963, of the Madras High Court in T.C. No. 152 of 1961.*

R. Venkatram and *R. Ganapathy Iyer,* Advocates, for Appellant.

B. Sen, Senior Advocate (*R.N. Sachthey,* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—In Sundaram & Company (Private), Ltd.—hereinafter called "the Company"—the public are not substantially interested within the meaning of section 23-A of the Indian Income-tax Act, 1922. In dealing with the assessment of income of the company for the assessment years 1946-47 to 1951-52, the Income-tax Officer, Central Circle, Madras, passed orders under section 23-A of the Income-tax Act, 1922, and directed that the total income of the company as determined in the years of assessment less tax payable be deemed to have been distributed amongst the shareholders of the company as on the relevant dates of the General Body Meetings. The following table sets out the relevant details :

Assessment year	Amount of dividend deemed to have been declared	Date of order passed under S. 23-A deeming dividend to have been declared
1946—47	46,563	March 18, 1952
1947—48	43,959	March 18, 1952
1948—49	47,829	March 18, 1952
1949—50	97,875	March 18, 1952
1950—51	92,591	March 18, 1952
1951—52	25,899	March 30, 1955
	3,54,716	

On 7th July, 1955 the company in a general meeting resolved that the amount of Rs. 3,54,716 which was under the orders of the Income-tax Officer deemed to have been distributed as dividend amongst the shareholders pursuant to orders under section 23-A of the Income-tax Act, be distributed as dividend to the shareholders, and in pursuance of that resolution proportionate part of the dividend due to each shareholder was credited to his account.

* (1963) 2 I.T.J. 486: (1963) 2 M.L.J. 584: (1964) 52 I.T.R. 763.

The Income-tax Officer completed the assessment of the company for the year 1956-57 and determined Rs. 5,69,396 as its total income. The Income-tax Officer computed the super-tax payable by the company under the Finance Act, 1956, at the rate of six annas and nine pies in the rupee of the total income, and granted a rebate at the rate of four annas in the rupee in accordance with the provisions of clause D, Proviso (i) (*b*) and (ii) of the Schedule to that Act. Sometime thereafter the Income-tax Officer being of the opinion that excessive relief had been granted to the company within the meaning of section 34 (1) (*b*) of the Income-tax Act, issued a notice on 31st January, 1959 for reopening the assessment for the year 1956-57. The company filed its return of income in compliance with the notice and contended that the proceedings commenced by the Income-tax Officer were unauthorised because the income of the company had not been the subject of " excessive relief" within the meaning of section 34 (1) (*b*), and that actual distribution of dividends already deemed to have been distributed in accordance with the orders passed under section 23-A cannot be taken into consideration for the purpose of reducing the rebate of super-tax admissible under the proviso 2 to Paragraph D of the Finance Act, 1956. The Income-tax Officer rejected the contentions and ordered that the rebate of super-tax to the extent of Rs. 80,978 be withdrawn.

In appeal to the Appellate Assistant Commissioner it was held that in the circumstances of the case, assessment could be reopened under section 34 (1) (*b*) on the ground that the income had been made the subject of " excessive relief", but only Rs. 77,600 and not the whole amount of Rs. 3,54,716 which was deemed to be distributed under orders section 23-A could be taken into consideration as dividend distributed by the company during the previous year relevant to the assessment year 1956-57.

The Commissioner of Income-tax appealed to the Income-tax Appellate Tribunal. He contended that in the circumstances of the case the amount of Rs. 3,54,716 was liable to be taken into consideration for the purpose of withdrawing the rebate of super-tax admissible under the Finance Act, 1956. The Tribunal held that the case of the company " did not fall within any of the situations contemplated by section 34 (1) (*b*)" and the company's income had not been the subject of excessive relief as the rebate of super-tax originally granted was out of the tax otherwise computable and not from the assessed income. But the Tribunal confirmed the order of the Appellate Assistant Commissioner directing that Rs. 77,600 be taken into account in withdrawing rebate of super-tax.

The Tribunal then referred three questions to the High Court of Judicature at Madras :

" 1. Whether the Tribunal was justified in disposing of the appeal as it did ?

2. Whether the Tribunal was right in law in entertaining the assessee's contention relating to the applicability of section 34 (1) (*b*) under Rule 27 of Appellate Tribunal Rules ?

3. Whether the setting aside of the assessment under section 34 (1) (*b*) was correct in law ?"

The High Court decided in favour of the company on the first two questions. In considering the third question the High Court observed that the plea of the company that re-assessment proceedings under section 34 (1) (*b*), on the ground of " excessive relief", cannot be initiated, must be accepted. The Court then proceeded to consider whether allowance of rebate to which the assessee was not entitled did not amount to assessing income at too low a rate, and observed that :

" there can be no question that the rebate of tax rate and a reduction of such rebate is essentially the arithmetic of rate. Reading however the provisions of the Finance Act, 1956, as a whole in the perspective that its chief aim and object is to prescribe the rate of income-tax and super-tax, it seems to us that an assessee escaping some of its provisions and failing to pay the full measure of tax is assessed at too low a rate."

The High Court accordingly held that proceedings under section 34 (1) (*b*) could be initiated when rebate in the payment of super-tax was granted to the assessee without reducing it in the circumstances set out in the second proviso to Part II of the First Schedule, Paragraph D in the Finance Act, 1956, on the ground that the

income, profits and gains of the company were assessed to tax at too low a rate. The High Court answered the third question in favour of the Commissioner. Against the order passed by the High Court on the third question, this appeal is preferred by the company. The Commissioner of Income-tax has not challenged the correctness of the decisions on Questions 1 and 2.

We are unable to agree with Counsel for the assessee that the first question raised an enquiry not only as to the correctness of the procedure followed by the Tribunal, but also to the right of the Income-tax Officer to initiate a proceeding under section 34 (1) (*b*) to bring to tax rebate which was not reduced. In terms, the first question relates to a matter of procedures : and in the answer records to that question it is not implied that the Income-tax Officer had no power to initiate the proceeding under section 34 (1) (*b*).

The third question raised by the Tribunal was defective. The true scope of the enquiry arising out of the argument before the Tribunal was not whether the order of assessment was proper, but whether the proceeding for re-assessment was properly initiated under section 34 (1) (*b*). That is how the High Court also understood the question. We therefore re-frame the question as follows :

"Whether the Income-tax Officer was in the circumstances of the case competent to initiate the proceeding under section 34 (1) (*b*) of the Indian Income-tax Act for bringing to tax the excessive rebate granted to the assessee ?"

Section 34 (1) (*b*) of the Indian Income-tax Act, as it stood at the relevant time, provided :

"If—

(*a*) * * * * * *

(*b*) notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act or that excessive loss or depreciation has been computed, he may in cases falling under clause (*a*) at any time and in cases falling under clause (*b*) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains or recompute the loss or depreciation allowance ; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

* * * * * *"

It was held by the High Court of Bombay in *P. S. Subramanyan, Income-tax Officer, Companies Circle I* (1), *Bombay, and another* v. *Simplex Mills Ltd.*[1], that

"The relief referred to in section 34 (1) (b) of the Income-tax Act, 1922, can only be such relief as is granted to the assessee by reason of his income, profits and gains being chargeable to tax. It is, therefore, referable to the various kinds of relief afforded to the assessee under the Act in respect of his income, profits and and gains, such for instance, as are granted under sections 15-A, 15-C, 49-A, 49-B, 49-C, 49-D, and 60 of the Act."

This Court affirmed the judgment of the Bombay High Court in *P. S. Subramanyam, Income-tax Officer, Companies Circle I* (1) *and another* v. *Simplex Mills Ltd.*[2] In *Simplex Mill's case*[2], advance tax paid by the assessee for the assessment year 1952-53 was found refundable and the Income-tax Officer allowed interest on the tax paid under section 18-A (5) of the Income-tax Act, 1922, as it then stood. The Act was amended by the Income-tax (Amendment) Act, 1953, with retrospective effect from 1st April, 1952, and it was found that interest allowed to the company was excessive. The Income-tax Officer then initiated a proceeding under section 34 (1) (*b*) to reassess the tax on the ground that income for that year had been under-assessed and had been made the subject of excessive relief. The Bombay High Court rejected the claim of the Income-tax Officer, and this Court held that the original assessment could not be reopened under section 34, because it could not be said

1. (1963) 48 I.T.R. 980.
2. (1963) 1 I.T.J. 321 : (1963) 1 S.C.J. 485 : (1963) 48 I.T.R. 182 (S.C.).

either that there was under-assessment of the income, or that excessive relief was granted. In the light of that judgment, the High Court opined that the claim of the Department to initiate a proceeding under section 34 (1) (*b*) on the ground that excessive relief was allowed could not be sustained. But the High Court held that a proceeding for reassessment could be initiated on the ground that income had been assessed at too low a rate. Counsel for the company contends that the High Court was in error in proceeding to enlarge the scope of the enquiry and in entering upon a question which was never mooted before the Tribunal.

Section 2 of the Finance Act, 1956, provides, in so far as it is material, that :

"Subject to the provisions of sub-sections (2), (3), (4) and (5), for the year beginning on the 1st day of April, 1956,—

(*a*) income-tax shall be charged at the rates specified in Part I of the First Schedule

* * * * * *

(*b*) rates of super-tax shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922) * * * *, be those specified in Part II of the First Schedule, *

* * * * * *"

Part II of the First Schedule specifies the rates of super-tax. Clause D provides :

"In the case of every company on the whole of total income	Six annas and nine pies in the rupee.

Provided that—

(i) * * * * * *

(ii) a rebate at the rate of four annas per rupee of the total income shall be allowed in the case of any company which satisfies condition (*a*), but not condition (*b*) of the preceding clause ; and

(iii) * * * * * *

Provided further that—

(i) the amount of the rebate under clause (i) or clause (ii), as the case may be, of the preceding proviso shall be reduced by the sum, if any, equal to the amount or the aggregate of the amounts, as the case may be, computed as hereunder :—

(*a*) on the amount representing the face value of any bonus shares or the amount of any bonus issued to its shareholders during the previous year with a view to increasing the paid-up capital, except to the extent to which such bonus shares or bonus have been issued out of premiums received in cash on the issue of its shares ; and	at the rate of two annas per rupee.
(*b*) in addition, in the case of a company referred to in clause (ii) of the preceding proviso which has distributed to its shareholders during the previous year dividends in excess of six per cent. of its paid-up capital, not being dividends payable at a fixed rate—	
on that part of the said dividends which exceed 6 per cent. but does not exceed 10 per cent. of the paid-up capital ;	at the rate of two annas per rupee.
on that part of the said dividends which exceed 10 per cent. of the paid-up capital ;	at the rate of three annas per rupee.

* * * * *"

Paragraph-D read with section 2 (*b*) of the Finance Act, 1956, fixes the rate of super-tax payable by companies for the purpose of section 55 of the Indian Income-tax Act. From the super-tax declared payable, in certain conditions rebate is granted, and that rebate is also related to the total income of the assessee. By the second proviso, part of the rebate may be withdrawn, if the company has in the previous year issued bonus shares or bonus or has distributed dividend in excess of six per cent. of its paid-up capital. The super-tax and the rebate admissible are both related to the total income, whereas the reduction of rebate is related to the face value of the bonus shares or of the value of bonus or the amount of dividends distributed. Super-tax payable by a company is therefore determined as a fraction of the total income, reduced by a percentage of the value of the bonus shares or bonus or dividends distributed.

Counsel for the company contends that the expression " too low a rate " used in section 34 (1) (*b*) must, having regard to the context in which the expression is used and in the scheme of the Indian Income-tax Act, be regarded merely as the fraction which determines tax liability of the assessee, but when in computing super-tax liability, the Income-tax Officer has after determining the amount by applying the fraction to reduce the resultant by reference to a factor unrelated to total income, it cannot be said that tax is charged at a certain rate. Counsel says that the Legislature has not used the expression " assessed at too low an amount" but the expression used is "assessed at too low a rate ": therefore, says Counsel for the company the jurisdiction of the Income-tax Officer will be attracted only when the wrong fraction has been applied in the determination of super-tax, and not when the computation of tax depends on other factors.

We are unable to accept this contention. The assumption that the expression " rate " has been used in section 34 (1) as meaning a fraction of total income is, in our judgment, not warranted. By the use of the expression " rate " in the context in which it occurs, undoubtedly a relation between the taxable income and the tax charged is intended, but the relation need not be of the nature of proportion or fraction. The expression " rate " is often used in the sense of a standard or measure. Provided the tax is computable by the application of a prescribed standard or measure, though not directly related to taxable income, it may be called tax computed at a certain rate. We agree with the High Court that the rebate of tax and the reduction of such rebate are essentially matters of measure or standards of rate. The chief aim and object of the Finance Act, 1956, is to prescribe the standard or measure of income-tax and super-tax and it seems that an assessee escaping some of its provisions, and failing to pay the full measure of tax is assessed at too low a rate.

But the view we have taken is not sufficient to dispose of the appeal. It may be recalled that the question arising out of the order of the Tribunal was about the competence of the Income-tax Officer to initiate proceedings under section 34 (1) (*b*). It is true that it was not argued before the Tribunal on behalf of the company that on the notice served by the Income-tax Officer proceedings for re-assessment could only be initiated on the ground that income had been the subject of excessive relief, and not on any other ground. But the company did contend that the initiation of the re-assessment proceeding was invalid, and the plea that the initiation was invalid because the notice was defective was only an aspect of the plea raised by the company. The question as originally raised by the Tribunal, and as reframed by us, includes that enquiry.

Counsel for the company did argue before the High Court that in a proceeding to reassess income initiated on a notice that income has been subject to excessive relief, the Income-tax Officer was incompetent to reassess income on the footing that income was assessed at too low a rate, but the High Court did not record their decision on that plea: they merely suggested that it will be open to the company to raise the question when the matter is again taken up for consideration. If however the question arising out of the order of the Tribunal was, as correctly pointed out by the High Court, one about the " validity of initiation of proceeding under section 34 (1) (*b*) ", the High Court was bound to decide all aspects of that question raised before them, before recording an answer : if they did not, the Tribunal would be powerless to enter upon an enquiry of any other aspect of the question after answer to the question is recorded by the High Court. We are unable to agree with the assumption made by the High Court that because a particular aspect of the question of law raised was not specifically argued before the Tribunal, the High Court cannot deal with that aspect.

We are, in the state of the record before us, unable to record an answer to the question, and the case must be remanded to the High Court to determine whether the proceedings were validly initiated on the notice issued against the company. The notice which was served upon the company is not included in the paper book prepared for use in this Court. The notice must of necessity be part of the record of the Income-tax Officer, even if it be not on the record of the Tribunal. It will be

open to the High Court, in determining the contention raised by the company, to call for a supplementary statement of the case relating to the form and contents of the notice and the validity thereof, from the Tribunal. After receiving the supplementary statement, if any, the High Court will proceed to dispose of the third question in the light of the reasons set out by us in this judgment. Costs of this appeal will be costs in the High Court.

V.S. ——— *Remanded.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

Commissioner of Income-tax, A. P. ... *Appellant**

v.

M/s. Motors & General Stores (P.) Ltd. .. *Respondent.*

Income-tax Act (*XI of* 1922), *section* 10 (2) (vii), *2nd proviso.—Applicability—Transfer of buildings and machinery by assessee in exchange for shares—Deed of exchange—Transaction, if a sale or exchange—Substance of the transaction as distinguished from the strict legal position—Relevancy—Taxability of profits—Transfer of Property Act* (V *of* 1882), *sections* 54, 118.

The assessee, a private limited company, owning a cinema house and being taxed on the profits made by exhibition of films therein, at a meeting of its Board of Directors held in 9th September, 1955, resolved that the Managing Director may be authorised to negotiate with a buyer for the sale of the entire concern with all its equipment and machinery, fittings etc., for a consideration of Rs. 1,20,000. An agreement was concluded to effect a sale and this was confirmed by the assessee-company at an extraordinary general body meeting in October, 1955. Pursuant thereto a deed called "exchange deed" was brought into existence on 21st March, 1956, and the consideration was received by the assessee in the shape of transfer of shares in a company of the face value of Rs. 1,20,000 held by the buyer. While the resolution of the assessee mentioned about the negotiation of the sale of the cinema for the consideration mentioned, the operative portion of the deed set out the exchange of the property for the shares. For the assessment year 1956-57 the Income-tax Officer found that the value realised by the transaction exceeded the written down value by Rs. 43,568 and accordingly computed the profits under section 10 (2) (*vii*) second proviso and included the same in the taxable income. The High Court in reference held that the transaction was not a sale within the scope of the second proviso to section 10 (2) (*vii*). The Revenue appealed.

Held, the transaction is not one of sale and does not attract the application of the second proviso to section 10 (2) (*vii*).

The definition of exchange in section 118 of the Transfer of Property Act is not limited to immovable property but it extends also to barter of goods. Both under the Sale of Goods Act and the Transfer of Property Act, a sale is a transfer of property in the goods or of the ownership in immovable property for a money consideration. The presence of money consideration is therefore an essential element in a transaction of sale. But in exchange there is a reciprocal transfer of interest in the immovable property, the corresponding transfer of interest in the movable property being denoted by the word "barter".

In the absence of any suggestion of bad faith or fraud the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction as embodied in the document. The doctrine that in revenue cases the "substance of the matter" may be regarded as distinguished from the strict legal position is erroneous.

*C. A. No. 819 of 1966. 2nd May, 1967.

On the facts : neither the recital in the preamble or the resolution of the Board of Directors of the assessee, mentioning the negotiation of the sale for a consideration, controlled the language of the operative part of the deed clearly setting out the exchange of the properties. The valuation of Rs. 1,20,000 fixed to consist of Rs. 60,000 for immovable properties and goodwill and Rs. 60,000 for movable properties was only for the purpose of payment of stamp duty. The transaction is one of exchange and there was no sale of the properties for any money consideration.

Appeal by Special Leave from the Judgment and Order dated the 30th October, 1964, of the Andhra Pradesh High Court in Case Referred No. 6 of 1963.*

D. Narsaraju, Senior Advocate (*T. A. Ramachandran* and *R. N. Sachthey*, Advocates, with him), for Appellant.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, on behalf of the Commissioner of Income-tax, Hyderabad, from the judgment of the Andhra Pradesh High Court dated 30th October, 1964, in a Case Referred No. 6 of 1963.

The respondent (hereinafter referred to as the "assessee-company") is a private limited company owning a cinema house called " Sree Rama Talkies", at Bobbili. It was being taxed on the profits made by exhibition of films therein. At a meeting of its Board of Directors held on 9th September, 1955, it was resolved that the Managing Director, the Raja of Bobbili, may be authorised to negotiate with the Zamindar of Chikkavaram or his nominee for the sale of the entire concern with all its equipment and machinery, fittings etc., for a consideration of Rs. 1,20,000. An agreement was concluded to effect a sale and this was confirmed by the assessee-company at an extraordinary general body meeting held on 4th October, 1955. Pursuant thereto a deed called the " exchange deed " was brought into existence on 21st February, 1956, and the consideration was received by the assessee-company in the shape of transfer of 5 per cent. tax-free cumulative preference shares in Sri Rama Sugar and Industries Ltd., Bobbili, of the face value of Rs. 1,20,000 held by the Zamindar and Zamindarini of Chikkavaram. Separate valuation was given for the immovable property and for the movables etc., and goodwill, each being valued at Rs. 60,000. For the assessment year 1956-57, the assessee-company submitted a return of income showing a sum of Rs. 9,823 as profits derived from the transaction. The Income-tax Officer found that the value realised exceeded the written down value by Rs. 43,568 and accordingly computed the profits under section 10 (2) (*vii*) of the Income-tax Act, 1922 and included the amount in the taxable income of the assessee-company. The order of the Income-tax Officer was confirmed by the Appellate Assistant Commissioner in appeal and by the Income-tax Appellate Tribunal except for allowing a sum of Rs. 5,000 as representing the cost of the goodwill. As directed by the High Court, the Appellate Tribunal stated a case under section 66 (2) of the Income-tax Act, 1922 on the following question of law :

"(1) Whether the transaction dated 21st February, 1956, amounts to a sale within the purview of the second proviso to section 10 (2) (*vii*) of the Indian Income-tax Act ?

alternatively,

(2) Whether the consideration for the sale is not the market value of the shares as on the date of the transaction, namely, Rs. 95 per share, but the face value of the shares."

After hearing the reference the High Court answered the question in favour of the assessee-company and against the Commissioner of Income-tax.

Section 10 (2) (*vii*) of the Income-tax Act, 1922 provides as follows :

" 10. *Business*. (2) Such profits or gains shall be computed after making the following allowances, namely :—

* (1965) 1 I.T.J. 560 : (1965) 1 An.W.R. 412.

. . . .

(*vii*) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value :

Provided that such amount is actually written off in the books of the assessee :

Provided further that where the amount for which any such building, machinery or plant is sold, whether during the continuance of the business or after the cessation thereof, exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place :

. . . ."

It is only if there is a sale of the cinema house and the other assets that the taxable profits and gains are to be computed in the present case under section 10 (2) (*vii*) as the amount by which the written down value exceeds the amount for which the assets are actually sold. The words " sale" or " sold" have not been defined in the Income-tax Act, 1922. Consequently, these words have to be construed by reference to other enactments. Section 54 of the Transfer of Property Act defines " sale" as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Section 54 of the Transfer of Property Act reads as follows:

" 'sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

There is no definition of the word "price" in this Act. But it is well-settled that the word "price" is used in the same sense in this section as in section 4 of the Sale of Goods Act (III of 1930) (*See* the decision of a Full Bench of the Madras High Court in *Madam Pillai* v. *Badrakali Ammal*[1]). Section 4 of the Sale of Goods Act reads as follows :

" (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Section 2 (10) of the Sale of Goods Act defines " price" as meaning the money consideration for a sale of goods. The presence of money consideration is therefore an essential element in a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale. Section 118 of the Transfer of Property Act defines " exchange" as follows :

" When two persons mutually transfer the ownership of one thing for the ownership of another neither thing or both things being money only, the transaction is called an 'exchange'. A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale."

Section 119 provides :

" If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so derpived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration."

The definition of exchange in section 118 of the Transfer of Property Act is not limited to immovable property but it extends also to barter of goods. It is clear therefore that both under the Sale of Goods Act and the Transfer of Property Act, sale is a transfer of property in the goods or of the ownership in immovable property

1. 42 M.L.J. 410 : (1922) I.L.R. 45 Mad 612 : A.I.R. 1922 Mad. 311.

for a money consideration. But in exchange there is a reciprocal transfer of interest in the immovable property, the corresponding transfer of interest in the movable property being denoted by the word "barter". "The difference between a sale and an exchange is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter." (Chitty on Contracts, 22nd Edn., Vol. II, page 582).

The question presented for determination in this case is whether the transaction of 21st February, 1956, was a sale and whether the Income-tax authorities were entitled to include the amount of Rs. 43,568 as profits under section 10 (2) (*vii*) of the Income-tax Act as representing the excess of the consideration realised by the assessee-company over the written down value of the assets transferred. On behalf of the appellant it was contended that the money consideration was fixed at Rs. 1,20,000 and the mode of payment was by transfer of shares and the transaction was really a sale and not transfer by way of exchange. We are unable to accept this argument as correct. In the first place, the document is called "exchange deed." The preamble of the document states :

"And whereas the party of the first part as at the directors' meeting held on 3rd February, 1955 resolved to exchange the property mentioned in Schedule for the property mentioned in Schedule II belonging to the party of the second part and whereas in pursuance of the resolution of the Board of Directors the Managing Director of the party of the first part had handed over possession of the property described in Schedule I hereto on 9th September, 1955, to the party of the second part and whereas the general body of the first part at a meeting held on 4th October, 1955, resolved to authorise the Managing Director of the party of the first part to negotiate with the Zamindar and Zamindarini of Chikkavaram the second part herein and/or their nominees for the sale of the party of the entire concern known by the name of Sri Rama Talkies, Bobbili, now owned by the party of the first part with all its equipment machinery fittings spares accessories the old Projector the Jeep car bearing No. M.S.P. 928 purchased from its funds all the buildings and out houses either newly constructed or mentioned in the registered sale deed No. 1464/5th September, 1949, and in this exchange deed together with entire premises covered thereby and the cash deposits lying with the various distributors and commercial tax department of the State Government more fully described in Schedule I hereto and also the goodwill of the concern for a consideration of Rs. 1,20,000 (Rupees one lakh twenty thousand only) consisting of immovable properties worth Rs. 60,000 and movable properties worth Rs. 20,000 (sic.) total Rs. 1,20,000 which will be received in the shape of transfer of 5 per cent. tax-free cumulative preference shares of Messrs. Sri Rama Sugars and Industries Ltd., Bobbili of the face value of Rs. 1,20,000 (Rupees one lakh twenty thousand only) held by the zamindar and zamindarini of Chikkavaram the party of the second part herein and more fully described in Schedule II herein and to transfer receipt and also hand over records relating to the title and management to enable them to carry on the business of the concern and whereas the general body of the part of the first part at the meeting held on 11th February, 1956, resolved that the action of the Managing Director in handing over possession of the property described in Schedule I to the party of the second part on 9th September, 1955, is approved and whereas the parties hereto have agreed to exchange the said properties described in the first and second Schedule hereto in the manner hereinafter appearing."

The operative part of the document reads as follows :

"Now this deed witnesseth as follows :—

(1) In pursuance of the said agreement and in consideration of the transfer by the party of the second part of the property more fully described in the Schedule II hereto to the party of the first part, the party of the first part hereby grants and transfer to the party of the second part II all the property more fully described in Schedule I hereto to hold the same to the party of the second part absolutely for ever.

(2) In further pursuance of the said agreement and in consideration of the transfer by the party of the first part of the property in Schedule I hereto to the party of the second part, the party of the second part hereby grants and transfers to the party of the first part of the shares more fully described in Schedule II hereto to hold the same to the party of the first part absolutely for ever.

(3) Each of the parties hereby covenants (sic) with the other first that the properties hereby transferred by him is free from encumbrance charge or lien of any kind whatsoever. Secondly that the properties so transferred by each of them shall be quitely entered upon held and enjoyed by the other of them and the rents and profits and dividends received by the other of them without any interruption or disturbance by the party transferring the same or any one claiming through or under them thirdly that each of the parties hereto will at the request of and cost of the other execute every such assurance and do every such act or thing as shall reasonably be required by such other for further or more.

(4) The party of the first part covenants and assures the party of the second part that all taxes due to the Government or the local bodies and all bills for the supply of electrical energy

goods and accessories all salaries due to the staff have been paid upto 9th September, 1955, the date of transfer and that the party of the second part will be in no way liable for any act done or commission made by the Rajah of Bobbili......................"

On behalf of the appellant Mr. Narsaraju referred to the resolution of the Board of Directors dated 9th September, 1955, in which it was resolved that the Managing Director will negotiate with the zamindar of Chikkavaram or his nominee for the sale of the Sree Rama Talkies with all its equipment etc., for a consideration of Rs. 1,20,000. Mr. Narsaraju also referred to the preamble in which the resolution of the Board of Directors dated 9th September, 1955, is quoted and also the resolution of the meeting of the general body of the assessee-company held on 4th October, 1955, authorising the Managing Director to negotiate " for the sale of the entire concern known by the name of Sree Rama Talkies." But, in our opinion, neither the recital in the preamble nor the resolution of the Board of Directors dated 9th September, 1955, will control the language of the operative portion of the document or its legal effect. There is no ambiguity in the construction of the operative part. It is clear from the operative part of the document that there was an exchange of the properties described in Schedule I for 5 per cent tax-free cumulative preference shares of Sri Rama Sugar & Industries Ltd., Bobbili. It is true that a valuation of Rs. 1,20,000 was fixed to consist of Rs. 60,000 for immoveable properties and the goodwill and Rs. 60,000 for moveable properties, but that is only for the purpose of payment of stamp duty. In essence the transaction is one of exchange and there was no sale of the properties described in Schedule I for any money consideration. In other words, there was no price paid or promised to be paid for the transfer of the cinema house known as Sree Rama Talkies together with machinery and equipment described in Schedule I to the deed dated 21st February, 1956, but there was a consideration in the shape of transfer of 5 per cent tax-free cumulative preference shares of Sri Rama Sugar & Industries Ltd. It follows therefore that the Income-tax authorities were not entitled to treat the transaction dated 21st February, 1956, as a sale and to apply provisions of section 10 (2) (*vii*) of the Income-tax Act.

We pass on to consider the argument of Mr. Narsaraju that in revenue matters it was the substance of the transaction which must be looked at and not the form in which the parties have chosen to clothe the transaction. It was contended that, in the present case, there was in substance a sale of Sree Rama Talkies by the assessee-company for a money consideration of Rs. 1,20,000 though the mode of payment was by transfer of shares and the resolution of the Board of Directors dated 9th September, 1955, clearly indicated that the intention of the assessee-company was to sell Sree Rama Talkies along with its equipment concerned for a consideration of Rs. 1,20,000. In the present case, however, there is no suggestion on behalf of the appellant of bad faith on the part of the assessee-company nor is it alleged that the particular form of the transaction was adopted as a cloak to conceal a different transaction. It is not disputed that the document in question was intended to be acted upon and there is no suggestion of *mala fides* or that the document was never intended to have any legal effect. In the absence of any suggestion of bad faith or fraud the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is embodied in a document the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction . In *Bank of Chettinad Ltd.* v. *Commissioner of Income-tax, Madras*[1], it was pointed out by the Judicial Committee that the doctrine that in revenue cases the "substance of the matter" may be regarded as distinguished from the strict legal position, is erroneous. If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might

1. (1940) 2 M.L.J. 851: (1940) 8 I.T.R. 522 : I.L.R. (1941) Mad. 89 : A.I.R. 1940 P.C. 183.

otherwise appear to be. In the *Duke of Westminster's case*[1], deeds of covenant had been executed by the Duke in favour of employees in such amounts that the covenantees, if remaining in the Duke's service, would receive respectively sums equivalent to their wages and salaries. If they left the service of the Duke the payments would still have been due, but it was in nearly all instances explained to the employee that so long as the service continued while the deed did not prevent his claiming ordinary wages in addition, it was expected that he would not do so. It was argued for the Crown that though in form a grant of an annuity, the transaction was in substance merely one whereby the annuitant was to continue to serve the Duke at his existing salary, so that the annuity must be treated as salary. Neither the Court of Appeal nor the House of Lords agreed with this contention. To regard the payments under the deeds as in effect payments of salary would be to treat a transaction of one legal character as if it were a transaction of a different legal character.. With regard to the supposed contrast between the form and substance of the arrangement, Lord Russell of Killowen stated at page 524 as follows :

> "If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India* v. *Scoble*[2]; that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine."

In a later case—*Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*[3]—Viscount Simon expressed the principle as follows :

> "It may be well to repeat two propositions which are well established in the application of the law relating to income-tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it.
>
> Secondly, a transaction which, on its true construction, is of a kind that would escape tax, is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax."

For the reasons already given we hold that the question has been rightly answered by the High Court in the negative and in favour of the assessee-company and this appeal must be dismissed with costs.

V.S. *Appeal dismissed.*

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1. (1936) 19 T.C. 490 : (1936) A.C. 1 : 51 T.L.R. 467.
2. (1903) A.C. 299 : 4 T.C. 618 : 72 L.J.K.B. 617 : 51 W.R. 675.
3. (1948) 16 I.T.R. (Supp.) 101.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J.C. SHAH, S.M. SIKRI AND V. RAMASWAMI, JJ.

M. M. Ipoh and others etc. .. *Appellants**

v.

Commissioner of Income-tax, Madras etc. .. *Respondent.*

The Attorney-General for India (By notice).

Income-tax Act (XI of 1922), sections 3 and 2 (9)—Association of persons—Assessment on the association of person or members thereof—Quasi-judicial function—Equality clause of Constitution—Nature of authority—Duty to prevent evasion, escapement or double taxation—Orders subject to further appeals—Adequate enunciation of principles and policy for guidance of Officer—No infringement of equality clause.

A Hindu father was originally assessed in respect of the income of certain properties as a resident individual or as the karta of Hindu undivided family. In back assessment proceedings for certain years and for other later years, the Income-tax Officer brought the income of such properties as income received by an association of persons formed between the father, his minor son and another firm which belonged to the family. The Tribunal found that the mother of the minor assented on behalf of the minor to form the association. The High Court in reference held that there was no such association for one year but there was one in respect of the assessment years in question. The High Court also held that the father was the principal officer of the association. A writ petition filed by the father challenging the validity of section 3 of the Act on the ground that it violated Article 14 of the Constitution was dismissed by the High Court. Against the order made in the writ petitions, the father, and against the orders made in the references, the association of persons, appealed.

Held, section 3 of the Act in so far as it confers power upon the Income-tax Officer to select either the association of persons or the members thereof for assessment to tax in respect of the income of the association does not violate Article 14 of the Constitution.

The procedure for assessment is the same whether the income is assessed in the hands of the association or the share of each member of the association is assessed separately. No question of application of a more drastic procedure or deprivation of valuable rights of appeal and revision by the adoption of one of two alternative procedure arises.

Where the legislature lays down the policy and indicates the rule or line of action which should guide the authority, Article 14 is not violated, unless the rules or the policy indicated lay down different criteria to be applied to persons or things similarly situate.

It is not essential for the legislature to comply with the guarantee of equal protection that the rules for the guidance should be laid down in express terms. Such guidance may be obtained from or afforded by (*a*) the preamble read in the light of the surrounding circumstances, which necessitated the legislation, taken in conjunction with well known facts of which the Court might take judicial notice or of which it is apprised by evidence before it in the form of affidavits, (*b*) or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally the object sought to be achieved by the enactment.

* (C. As. Nos. 1060 to 1064 of 1955.)
with
(C. As. Nos. 1103 to 1107 of 1966.)

26th July, 1967.

Section 3 of the Act does not expressly lay down any policy for the guidance of the Officer in selecting the association or the members individually as entitled in bringing to tax the income earned by the association.

The duty of the Officer is to administer the provisions of the Act in the interests of the public revenue and to prevent evasion of tax or escapement and to avoid double taxation. The function of the Officer is fundamentally quasi-judicial and his decision to assess either the association of persons or members thereof is not final but is subject to further appeals. The nature of the authority exercised by the Officer and his duty to prevent evasion or escapement and to prevent double taxation (as in the analogous provision relating to unregistered firm) constitute adequate enunciation of principles and policy for the guidance of the Officer.

There is nothing in the Act which indicates that a minor cannot become a member of an association of persons for the purposes of the Act. The definition of "person" in the Act is an inclusive one and resort may appropriately be had to the General Clauses Act. Clause (42) of section 3 of the General Clauses Act defines a "person" as inclusive of any company, association or body of individuals whether incorporated or not and that inclusive definition in the General Clauses Act would also apply under the Act. A firm and an individual or group of individuals are persons and can constitute an association of persons.

The doctrine of *res judicata* does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment; the findings on question of fact may be good and cogent evidence in subsequent years, when the same question falls to be determined in another year, but they are not binding and conclusive.

It is open to the Officer to serve a notice on a person who is intended to be treated as the principal officer. The order assessing the association containing a finding that the person served is the principal officer is sufficient compliance with the requirements of the Act. It is open to the association or the person so served as the principal officer thereof to challenge the finding in appeals. But the order declaring him as the principal officer of an association will not be deemed to be void merely because the proceeding for assessment was not preceded by a declaration of the status of the person treated as the principal officer.

The High Court in a reference under section 66 is not competent to disturb findings of fact recorded by the Tribunal and arrive at another finding.

Appeals by Special Leave from the Judgment* and Order dated the 3rd April, 1961 of the Madras High Court in Tax Case No. 201 of 1960 and from the Judgment and Order dated the 29th November, 1963 of the Madras High Court in Writ Petitions Nos. 1374 to 1378 of 1961.

M. K. Nambiyar, Senior Advocate (*K. Narayanaswami*, *B. Manivannan* and *B. Parthasarathy*, Advocates and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellants (in all the Appeals).

S. T. Desai, Senior Advocate (*R. Ganapathy Iyer* and *R. N. Sachthey*, Advocates, with him), for Respondent (in all the Appeals) and for the Attorney-General for India (in C.As. Nos. 1103 to 1107 of 1966).

The Judgment of the Court was delivered by

Shah, J.—Meyyappa (I), Alagammal his wife, and Chokalingam and Meyyappa (II) his two minor sons formed in 1940 a Hindu undivided family which traded in the name of M. S. M. M. The family carried on extensive business in money-lending, rubber plantations, and in real estates in the Federated States of Malaya, Burma and India.

* (1962) 1 M.L.J. 205: I.L.R. (1962) Mad. 175.

The property of the family was divided between the three male members on 22nd February, 1940. To Meyyappa (I) were allotted at the partition "business of the family" at Rangoon and at Karaikudi in the Ramnath District and three rubber estates in the Federated States of Malaya and some houses. Even after the partition Meyyappa (I) continued to remain in management on behalf of himself and his two minor sons of all the properties and the business carried on by the family when it was joint, and the businesses were carried on in the name of "M. S. M. M.".

The houses and the three rubber estates allotted exclusively to Meyyappa (I) were entered in the books of accounts opened in the name of "M. M. Ipoh" from the date of the division. In December, 1941 Alagammal gave birth to a son who was named Chettiappa. Meyyappa (I) and Chettiappa then constituted a Hindu coparcenary which owned the property and the business as allotted to Meyyappa (I) in the partition of 1940. On 30th December, 1949 a deed of partition was executed between Meyyappa (I) and Chockalingam (who had by then attained the age of majority), in respect of the business carried on in the name of "M. S. M. M." The businesses were thereafter carried on in partnership between Meyyappa (I) representing himself and the minor Chettiappa and Chockalingam. Meyyappa (II) was admitted to the benefits of that partnership. On 13th April, 1950 partition was effected between Meyyappa (I) and the minor Chettiappa by posting entries in the books of account of M. M. Ipoh. It was agreed that the properties entered in the books of account of M. M. Ipoh shall be held by Meyyappa (I) and Chettiappa in two equal shares, and that the properties shall continue to remain in the management of the firm M. S. M. M. to the benefit of which Chettiappa was admitted. A deed of partition recording the terms of that partition was executed on 28th May, 1953 by Meyyappa (I) and Alagammal acting as guardian of the minor Chettiappa.

In 1951 Meyyappa (I) acceded to a demand made by Chockalingam on behalf of the M. S. M. M. firm for a half share in the "M. M. Ipoh properties." There was however no division of the properties by metes and bounds, and the management of those properties as a single unit continued to remain with the M. S. M. M. firm as before.

Meyyappa (I) was assessed under the Indian Income-tax Act, 1922 to tax year after year till the assessment year 1953-54 in respect of the income from the "M. M. Ipoh properties" as a resident individual or as a *karta* of a Hindu undivided family. Later the Income-tax Officer, Karaikudi, Ramnad District, issued notices under section 34 (1) of the Income-tax Act for the assessment years 1951-52 to 1953-54 and under section 22 (2) for the years 1954-55 to 1956-57 for assessment of the income of "an association of persons styled M. M. Ipoh." The Income-tax Officer rejected the contentions raised by Meyyappa (I) that there was no association of persons of the nature described in the notices and brought to tax the income of the "M. M. Ipoh Properties" as income received by an association of persons formed by Meyyappa (I) and Chettiappa in 1951-52 and by Meyyappa (I), the M.S.M. M. firm and Chettiappa in the years 1952-53 to 1956-57.

In appeals filed by M.M. Ipoh, the Appellate Assistant Commissioner confirmed the orders passed by the Income-tax Officer subject to the modification that the income from the houses be assessed under section 9 (3) of the Income-tax Act in the hands of the members individually, and not as the collective income of the association of persons. The Appellate Tribunal confirmed the order of the Appellate Assistant Commissioner.

The Tribunal drew up a statement of case and submitted under section 66 (1) of the Indian Income-tax Act, the following question for determination of the High Court of Madras :

> "Whether the assessments on the 'association of persons' for assessment years 1951-52 to 1956-57 are valid ?"

and declined to submit a statement of the case on five other questions, the first out of which alone is material in these appeals and need be set out :

"Whether on the facts and in the circumstances of the case, there are any materials to hold the assessee as the principal officer of M. M. Ipoh assessed in the status of an association of persons?"

At the hearing of the reference on the principal question, the High Court on the application of the assessee proceeded to deal apparently without any objection from the Commissioner with the additional question which had not been referred by the Tribunal.

The High Court held that the income brought to tax in the assessment year 1951-52 did not accrue to an association of persons, but the income in the years 1952-53 to 1956-57 accrued to an association of persons formed by Meyyappa (I), M.S.M.M. firm and the minor Chettiappa. The High Court was of the view that Meyyappa (I) acted on behalf of Chettiappa in forming the association, that the affairs of this association were under the management of Meyyappa (I) during the account years relevant to the assessment years 1952-53 to 1956-57, that the association of persons was engaged in a joint enterprise for the purpose of producing income, that there being "unity of purpose and objectivity" the ultimate object of the association to earn income on behalf of the members of the association was "fully established". The High Court also held that by the notices for assessment of the income for the years 1952-53 to 1954-55 Meyyappa (I) did in fact have notice of the intention of the Income-tax Officer to treat him as the principal officer of the association and the proceedings for assessment and reassessment were properly commenced. The High Court accordingly by order dated 3rd April, 1961 answered the first question in favour of the assessee in respect of the assessment year 1951-52 and against the assessee for the subsequent five assessment years. The High Court recorded in answer to the second question that the Income-tax Officer was justified in holding Meyyappa (I) to be the principal officer of "M.M. Ipoh."

On 21st November, 1961 five petitions were moved in the High Court of Madras under Article 226 of the Constitution for a writ of *prohibition* restraining the Income-tax Officer from enforcing the demands made by him in respect of the tax assessed against "the association of persons M.M. Ipoh." In support of the petitions it was urged that section 3 of the Indian Income-tax Act invested the Income tax Officer with arbitrary and un u ded power to assess to tax the income of an association of persons in the hands either of the association or of the persons constituting that association, and on that account section 3 offended Article 14 of the Constitution, and was to that extent void. The High Court rejected the petitions. Against the orders passed by the High Court in the petitions for writs, Meyyappa (I) has appealed. Against the orders recorded by the High Court in references under section 66 the association of persons "M.M. Ipoh" has appealed.

Section 3 of the Income-tax Act invests the taxing authority with an option to assess to tax the income collectively of the association of persons, in the hands of the association or in separate shares in the hands of the members of the association. Counsel for the assessee contends that the Act sets out no principles and discloses no guidance to the Income-tax Officer in exercising the option : the Act therefore confers arbitrary and uncontrolled authority upon the Income-tax Officer to select either the association or its members for assessment to tax according to his fancy, and may on that account be discriminatively administered by subjecting persons similarly situate to varying rates of tax.

Counsel in support of that plea relied upon the judgment of this Court in *Suraj Mall Mohta & Co.* v. *A.V. Visvanatha Sastri and another*[1], but that case is of little assistance to the assessee. In *Suraj Mall Mohta's case*[1], this Court declared sub-section (4) of section 5 of the Taxation of Income (Investigation Commission) Act 30 of 1947 and the procedure prescribed by that Act, in so far as it affected the persons proceeded against under that sub-section, invalid as a piece of discriminatory legislation and on that account offending against Article 14 of the Constitution of India. The Court held that sub-section (4) of section 5 of the Act XXX of 1947 dealt

1. (1954) S.C.J. 611 : (1955) 1 S.C.R. 448 : (1954) 26 I.T.R. 1 : A.I.R. 1954 S.C. 545.

with the same class of persons who fall within the ambit of section 34 of the Indian Income-tax Act, 1922 and whose income can be brought to tax by proceeding under that section. The result in the view of the Court was that some assessees who had evaded payment of tax by failing to disclose fully and truly all material facts necessary for assessment of tax could be dealt with under Act XXX of 1947 at the choice of the Commission, though they could also be proceeded with under section 34 of the Indian Income-tax Act. Persons discovered as evaders of income-tax during an investigation under section 5 (1) of Act XXX of 1947, and persons discovered by the Income-tax Officer to have evaded payment of tax had in the view of the Court "common properties and common characteristics", and since the procedure prescribed under Act XXX of 1947 was more drastic and deprived the assessee of valuable rights of appeal, second appeal and revision, section 5 (4) of Act XXX of 1947 under which a person could be selected for discriminatory treatment at the choice of the Investigation Commission, was void as infringing the guarantee of equality before the law.

But here no question of application of a more drastic procedure, or deprivation of valuable rights of appeal and revision, by the adoption of one of two alternative procedures arises. The procedure for assessment is the same whether the income is assessed in the hands of the association or the share of each member of the association is assessed separately. In *Shri Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar and others*[1] S.R. Das, C.J., observed at page 299 :

> " In determining the question of the validity or other wise of * * * a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion or classification. After such scrutiny, the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself."

In *Jyoti Pershad* v. *The Administrator for the Union Territory of Delhi*[2], this Court observed that where the Legislature lays down the policy and indicates the rule or line of action which should guide the authority, Article 14 is not violated, unless the rules or the policy indicated lay down different criteria to be applied to persons or things similarly situate. It is not however essential for the Legislature to comply with the guarantee of equal protection that the rules for the guidance should be laid down in express terms. Such guidance may be obtained from or afforded by (*a*) the preamble read in the light of the surrounding circumstances which necessitated the legislation, taken in conjunction with well-known facts of which the Court might take judicial notice or of which it is apprised by evidence before it in the form of affidavits, (*b*) or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the object sought to be achieved by the enactment.

Section 3 of the Income-tax Act does not, it is true, expressly lay down any policy for the guidance of the Income-tax Officer in selecting the association or the members individually as entities in bringing to tax the income earned by the association. Guidance may still be gathered from the other provisions of the Act, its scheme, policy and purpose, and the surrounding circumstances which necessitated the legislation. In considering whether the policy or principles are disclosed, regard must be had to the scheme of the Act. Under the Act of 1922 the Income-tax Officer is required to issue a general notice calling upon all persons whose total income during the previous year exceeds the minimum not chargeable to tax to submit a return of income. The Income-tax Officer may also serve an individual notice requiring a person whose income in the opinion of the Income-tax Officer is liable to tax to

1. (1959) S.C.J. 147 : (1959) 1 An.W.R. (S.C.) 67 : (1959) 1 M.L.J. (S.C.) 67 : (1959) S.C.R. 279 : A.I.R. 1958 S.C. 538.

2. (1962) 2 S.C.R. 125 : (1962) 2 S.C.J. 58 : A.I.R. 1961 S.C. 1602.

submit a return of income. Primarily the return of income would be made by an association, where the association has earned income, and the Income-tax Officer would also call upon the association to submit a return of its income, and would ordinarily proceed to assess tax on the return so made. But for diverse reasons, assessment of the income of the association may not be possible or that such assessment may lead to evasion of tax. It would be open to the Income-tax Officer then to assess the individual members on the shares received by them. The duty of the Income-tax Officer is to administer the provisions of the Act in the interests of public revenue, and to prevent evasion or escapement of tax legitimately due to the State. Though an executive officer engaged in the administration of the Act the function of the Income-tax Officer is fundamentally quasi-judicial. The Income-tax Officer's decision of bringing to tax either the income of the association collectively or the shares of the members of the association separately is not final ; it is subject to appeal to the Appellate Assistant Commissioner and to the Tribunal. In *Commissioner of Income-tax, U. P.* v. *Kanpur Coal Syndicate*[1], it was held by this Court that the Appellate Tribunal has ample power under section 33 (4) to set aside an assessment made on an association of persons and to direct the Income-tax Officer to assess the members individually or to direct amendment of the assessment already made on the members. Exercise of this power is from its very nature contemplated to be governed not by considerations arbitrary but judicial. The nature of the authority exercised by the Income-tax Officer in a proceeding to assess to tax income, and his duty to prevent evasion or escapement of liability to pay tax legitimately due to the State, constitute, in our judgment, adequate enunciation of principles and policy for the guidance of the Income-tax Officer.

Counsel for the appellants contended that section 23-A of the Income-tax Act, as it was incorporated by Act 21 of 1930, laid down certain principles for the guidance of the Income-tax Officer in exercising his option, but since the Legislature by Act VII of 1939 repealed that provision the discretion vested in the Income-tax Officer to select either the income of the association or the individual members is unfettered. To appreciate the argument it is necessary to set out in some detail the legislative history. Under the Indian Income-tax Act, 1922, as originally enacted, an association of persons or individuals was not an entity the income whereof was charged to tax. By Act XI of 1924 "association of individuals" was added in section 3 and an entity of which the income is charged to tax under the Income-tax Act, but the Act as it stood amended contained no statutory safeguard against double taxation of income earned by an association of individuals. Section 14 (1) of the Act (as it then stood) which aimed at avoiding double taxation of the same income was applicable to the income of a Hindu undivided family, to the income of a company distributed as dividends to shareholders and to the income of a firm profits whereof were assessed in its hands. The Legislature amended section 14 of the Act by Act XXII of 1930 and remedied the defect by modifying clause (*c*) of sub-section (2) of section 14 of the Act and provided that " any sum which he (the assessee) received as his share of the profits or gains of an association of individuals, other than a Hindu undivided family, company or firm, where such profits or gains have been assessed to income-tax", shall not be subject to tax. The Legislature also enacted Act XXI of 1930 which made several modifications in the Income-tax Act. It provided for registration of firms and added section 23-A which provided :

> " (1) Where the Income-tax Officer is satisfied that any firm or other association of individuals carrying on any business , other than a Hindu undivided family or a company, is under the control of one member thereof, and that such firm or association has been formed or is being used for the purpose of evading or reducing the liability to tax of any member thereof, he may, with the previous approval of the Assistant Commissioner pass an order that the sum payable as income-tax by the firm or association shall not be determined, and thereupon the share of each member in the profits and gains of the firm or association shall be included in his total income for the purpose of his assessment thereon."

A similar provision with regard to companies was also incorporated in sub-section (2) of section 23-A. Broadly speaking, by the amended provision discretion was given to the Income-tax Officer to treat as separate entities for the purpose of

1. (1964) 2 I.T.J. 258 : (1964) 2 S.C.J. 487 : (1964) 53 I.T.R. 225 : A.I.R. 1965 S.C. 325.

taxation the individuals forming any association carrying on business, of which only one member was competent to bind the association by his acts, and to give to the Income-tax Officer discretion to treat the members of a company as separate entities in certain conditions. But section 23-A (1) as enacted by Act XXI of 1930 applied only to firms and association of individuals if the management was in the hands of one person; it did not in terms apply to cases where the management was in the hands of more persons than one, even if it was formed for the purpose of evading or reducing the liability to tax of any member thereof. By Act VII of 1939 the expression "association of persons" was substituted for "association of individuals", section 23-A (1) was deleted, and sub-section (5) was added to section 23. Sub-section (5) of section 23 prescribed the mechanism for bringing to tax the income of a firm registered or unregistered. If the firm was registered, the share of each partner was to be separately taken into account together with his other income and brought to tax. If it was an unregistered firm, the income of the firm itself was brought to tax, unless the Income-tax Officer was of the opinion that the correct amount of the tax including super-tax, if any, payable by the partners under the procedure applicable to a registered firm would be greater than the aggregate amount payable by the firm and the partners if the firm is assessed as an unregistered firm. In respect of unregistered firms a practical scheme which aimed at preventing evasion of tax was devised by enactment of section 23 (5) (*b*).

After the repeal of section 23-A (1) as introduced by Act XXI of 1930 no similar provision conferring discretion upon the Income-tax Officer similar to the discretion which is prescribed by the terms of section 23 (5) (*b*) in respect of the income of the unregistered firms was expressly enacted. But it cannot be inferred that it was intended to make the discretion of the Income-tax Officer *qua* the assessment to tax the income of an association of persons in the hands of individual members collectively, arbitrary or unfettered. By the repeal of section 23-A (1) the essential nature of the power of an Income-tax Officer was not altered. He remained as before under a duty to administer the Act, for the benefit of public revenue, but his powers were to be exercised judicially and so as to avoid double taxation of the same income.

This resume of the legislative provisions discloses that the relevant provisions were made with a view to ensure against evasion of tax, while ensuring that the same income shall not be charged more than once.

The policy and the purpose of the Act may be gathered from "other operative provisions applicable to analogous or comparable situations": *Jyoti Pershad's case*[1], and there can be no doubt that an unregistered firm and an association of persons are closely analogous. If the income is earned by an association of persons, normally a return would be made or asked for under section 22 from the association, and the income of the association would be brought to tax. If, it appears to the Income-tax Officer that by taxing the association of persons evasion of tax or escapement of tax liability may result, he is given a discretion to tax the individual members ; but the discretion is to be exercised judicially and not arbitrarily, and its exercise is capable of rectification by superior authorities exercising judicial functions.

It cannot therefore be said that there is, by investing authority in the Income-tax Officer to select the association of persons or individual members thereof for the purpose of assessing to tax the income of the association, denial of equality before the law between persons similarly situate within the meaning of Article 14 of the Constitution so as to render section 3 in so far as it confers power upon the Income-tax Officer to select either the association of persons or the members thereof for assessment to tax in respect of the income of the association void. Appeals Nos: 1103—1107 of 1966 must therefore fail.

In the group of appeals which arise out of the order passed by the High Court in exercise of its advisory jurisdiction under the Income-tax Act, Counsel for the assessee urged that there was no association in fact, that Chettiappa being at all material times a minor there could in law be no association of which the income

1. (1962) 2 S.C.J. 58: (1962) 2 S.C.R. 125: A.I.R. 1961 S.C. 1602 at p. 139.

could be brought to tax, and that in any event there was no evidence to prove that any one on behalf of Chettiappa had assented to the formation of the association.

The expression " person " is defined in section 2 (9) of the Indian Income-tax Act, 1922 as including " a Hindu undivided family and a local authority ". The definition is inclusive and resort may appropriately be had to the General Clauses Act to ascertain the meaning of the expression "person". Clause (42) of section 3 of the General Clauses Act defines a "person" as inclusive of any company, association or body of individuals whether incorporated or not, and that inclusive definition in the General Clauses Act would also apply under the Income-tax Act. A firm is therefore a " person " within the meaning of the Income-tax Act, and a firm and an individual or group of individuals may form an association of persons within the meaning of section 3 of the Indian Income-tax Act.

There is nothing in the Act which indicates that a minor cannot become a member of an association of persons for the purposes of the Act. In *Commissioner of Income-tax, Bombay* v. *Laxmidas and another*[1], it was held that the fact that one of the individuals was a minor did not affect the existence of the association, if in point of fact, the assessees had associated together for the purpose of gain. In *Commissioner of Income tax, Bombay North, Kutch and Saurashtra v. Indira Balkrishna*[2], it was held

> " that the word ' associate ' means * * * 'to join in common purpose, or to join in an action'. Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains."

In the case before us, there is abundant material to prove that Meyyappa (I), his minor son Chettiappa and M. S. M. M. firm formed an association in the years 1952-53 to 1956-57. To review the relevant facts the "M. M. Ipoh properties" which were allotted to Meyyappa (I) at the partition in 1940 became on the birth of Chettiappa properties of a coparcenary, and it is common ground that Chettiappa acquired a share in the income which Meyyappa (I) received from the M. S. M. M. firm : the " M. M Ipoh properties " were used in a trading venture and were managed by the M. S. M. M. firm : the selling agency was common between M. S. M. M. firm and 'M. M. Ipoh' the stocks and expenditure of the M. M. Ipoh firm were not separately determined and common books of account were maintained for the management of the M. M. Ipoh properties and the M. S. M. M. firm dealings.

Alagammal—mother of Chettiappa—had executed the deed of partition, dated 13th April, 1950 as the guardian of Chettiappa. By the deed she acknowledged having received the share of Chettiappa in the property. The Tribunal found that the management was entrusted to the M. S. M. M. firm on behalf of " M. M. Ipoh ", and that in entrusting the management Alagammal must have given her consent. In paragraph 11 of the statement of the case, the Tribunal observed :

> " The integrity and management of the estates have continued undisturbed right throughout the period, only the holding thereof by various members having changed from time to time. The volition necessary is only all too apparent ; the entrustment of the management to M. S. M. M. firm for a proper management implies a prior agreement to which the guardian of the minor must have given her consent too."

These observations relate to the entire period of six years, 1951-52 to 1956-57. In the view of the High Court division of the status of joint Hindu family on 13th April, 1950 between Meyyappa (I) and Chettiappa was brought about not as a result of any mutual agreement between the coparceners, but by Meyyappa (I) in exercise of his power to do so under the Hindu law, and solely from the feature that the share of minor son Chettiappa was not separated by metes and bounds, a conclusion could not be reached that Meyyappa (I) and Chettiappa continued as members of an association of persons. The minor had no volition of his own to express, and the fact that at the partition the minor was represented for purposes of form and nothing more by his father, cannot be taken to mean that the mother as his guardian

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1. I.L.R. (1937) Bom. 830 : 39 Bom. L.R. 910 : (1937) 5 I.T.R. 584 : A.I.R. 1938 Bom. 41.
2. (1960) 3 S.C.R. 513 : (1960) 39 I.T.R. 546: A.I.R. 1960 S.C. 1172.

exercised any volition on behalf of the minor. In the view of the High Court "to form an association of persons no agreement enforceable at law was necessary" : but that "is not the same thing as to say that an agreement—express or implied—may be inferred, where none can possibly exist". The High Court rejected the contention raised on behalf of the Revenue that the father must have acted as the guardian of the minor in forming the association in 1951-52. The High Court however held that in the year 1952-53 and subsequent years an association of persons was formed and Meyyappa (I) joined that association on behalf of himself and Chettiappa. Counsel for the assessee contends that once the High Court reached the conclusion that in the year 1951-52 there was no association of persons, the conclusion that an association of persons existed in the subsequent years could not be reached in the absence of positive evidence to show that after the close of the year 1951-52 an association of persons was actually formed.

We are not called upon in these appeals to consider whether the learned Judges of the High Court were right in the view which they have taken in so far as it relates to the assessment years 1951-52. We are only called upon to consider whether the conclusion of the Tribunal that in fact an association of persons existed in the year 1952-53 and subsequent years was based on any evidence. In our judgment the facts proved clearly show that there was such an association in the years 1952-53 and the subsequent years. Pursuant to the three partitions no division by metes and bounds of the shares of the owners was made ; only the shares in the income of the owner were entered in the books of account. There was common management of the properties, and there was even a common selling agency. Alagammal had acted as a guardian of Chettiappa in the deed of partition. The Tribunal inferred that Alagammal must have assented to the formation of the association on behalf of Chettiappa and in the various transactions relating to the entrustment of management. It is true that this finding related to the year 1951-52 as well, and the High Court has disagreed with that finding in so far as it related to the year 1951-52. But on that account the finding of the Tribunal in respect of the subsequent years cannot be discarded. The Association which has earned income in the years 1952-53 and thereafter is an association different from the association in 1951-52. In 1951 Chockalingam had demanded a share in the "properties of M. M. Ipoh" and he was given a half share. The shares of Meyyappa (I) and Chettiappa in the properties were reduced, and thereafter ownership in the "properties of M. M. Ipoh" and its activities vested in an association formed by Meyyappa (I), the M. S. M. M. firm and Chettiappa. It is common ground that "M. M. Ipoh" was a trading venture and its management was entrusted in the relevant years to the M. S. M. M. firm.

The doctrine of *res judicata* does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment : the findings on questions of fact may be good and cogent evidence in subsequent years, when the same question falls to be determined in another year, but they are not binding and conclusive. The finding recorded by the High Court that in the year 1951-52 there was no association of persons constituted by Meyyappa (I) and Chettiappa for earning income from M. M. Ipoh properties will not in the present case have any effect on the finding of the Tribunal that in year 1952-53 and the subsequent years such an association existed. It must again be remembered that the association of persons which traded in 1952-53 and the subsequent years was an association different from the association in 1951-52. After the reduction in the shares of Meyyappa (I) and Chettiappa in the "M. M. Ipoh properties" a fresh arrangement for entrustment of the management of the properties to the M. S. M. M. firm was necessary and according to the findings of the Tribunal, Alagammal assented on behalf of Chettiappa to that arrangement.

Counsel for the assessee contended that for the finding that Alagammal assented on behalf of Chettiappa to form an association was not supported by any evidence on the record. But from readjustment of the shares in the "M. M. Ipoh properties" admission of Chettiappa to the benefits of M. S. M. M. firm, and the management of "M. M. Ipoh properties" continuing to remain with the M. S. M. M. firm, with

a common selling agency, and the execution of the deed of partition by Alagammal, an inference could reasonably be made that a person purporting to act as guardian of Chettiappa concurred in forming the association and that the person so concurring was Alagammal. The finding recorded by the Tribunal is one of fact, and was not liable to be questioned before the High Court. It is also pertinent to note that the finding that Alagammal acted on behalf of Chettiappa in forming the association for the years 1952-53 was never challenged and was not sought to be made the subject of a question in an application to the Tribunal under section 66 (1) and no question in that behalf was referred to the High Court. It is true the High Court was of the view that in the years 1952-53 to 1956-57 Meyyappa (I) acted on behalf of Chettiappa in forming the association. But the High Court in a reference under section 66 of the Income-tax Act was incompetent to disturb what was essentially a finding of fact recorded by the Tribunal and arrive at another finding.

On the other question which has been answered by the High Court the Tribunal declined to submit a statement of the case, because in their view it did not arise out of their order. They pointed out that a ground in support thereof was taken in the memorandum of appeal but as it was not pressed before the Appellate Assistant Commissioner, they did not deal with it. The High Court observed that the Tribunal was bound to deal with the question irrespective of whether it was agitated before the Appellate Assistant Commissioner. Even assuming that the second question was properly raised in the form and in the manner in which it was raised by the High Court, the answer to the question must, on the facts found, be against the assessee. Counsel for the assessee contended that there were no materials on which the Tribunal could hold that Meyyappa (I) was the principal officer of " M. M. Ipoh ", and since the Income-tax Officer had made no enquiry before issuing the notice treating Meyyappa (I) was the principal officer of " M. M. Ipoh ", Meyyappa (I) could not be so treated for the purpose of the proceedings for assessment. Under section 22 (2), the Income-tax Officer may if in his opinion the income of a person is liable to Income-tax, serve a notice upon him requiring him to furnish a return in the prescribed form. The notice under section 34 for re-assessment must also contain all or any of the requirements which may be included in a notice under sub-section (2) of section 22. Such a notice may be served under section 63 (2) of the Income-tax Act upon the principal officer of an association of persons. Under the definition in section 2 (12) a " principal officer"—omitting parts not material " used with reference to * * * any association means—(*a*) * * * (*b*) any person connected with the authority, company, body, or association upon whom the Income-tax Officer has served a notice of his intention of treating him as the principal officer thereof". The Income-tax Officer, Karaikudi, assessed the income of " the association M. M. Ipoh by its principal officer M. S. M. M. Meyyappa Chettiyar ". No objection was ever raised before the Income-tax Officer about the regularity of the proceedings and the Income-tax Officer found that Meyyappa (I) was the principal officer of the association. Even before the Appellate Assistant Commissioner it was not argued that Meyyappa (I) was not the principal officer. For the first time that ground was taken before the Tribunal. The notices served on Meyyappa (I) are not printed in the record prepared for use in this Court. In the orders of assessment for the year 1952-53 and the subsequent years it is recorded that action was taken to bring to tax the income of " M. M. Ipoh ", and in response to the notices the principal officer Meyyappa (I) had filed returns. The assessee submitted an application under section 66 (2) during the course of the hearing before the High Court of the question referred by the Tribunal. The High Court granted that application and without calling for a formal statement of the case on the question sought to be raised, heard the parties. It may be reasonably assumed that the assessee was prepared to argue the case on the footing that the statements in the orders of the Income-tax Officer were correct. In the circumstances it must be held that the Income-tax Officer did serve a notice of his intention to treat a person connected with the association as the principal officer thereof. The Income-tax Officer assessed the income of the association as represented by Meyyappa (I) its principal officer. There is, in our judgment, nothing in the Act which supports the contention of Counsel for the assessee that before proceedings

in assessment can commence against an association of persons a notice must be issued and an order passed after giving opportunity to the person proposed to be treated as the principal officer opportunity to show cause why he should not be so treated. It is open to the Income-tax Officer to serve a notice on a person who is intended to be treated as the principal officer. The person so served may object that he is not the principal officer or that the association is not properly formed. The Income-tax Officer will then consider whether the person served is the principal officer and whether he has some connection or concern with the income sought to be assessed. There is in the Income-tax Act an analogous provision in section 43 of the Act which authorises the Income-tax Officer to treat a person as a statutory agent of the non-resident for the purpose of assessing him to tax, the income received by the non-resident. It was held by the Judicial Committee in *Commissioner of Income-tax, Punjab & N. W. F. P.* v. *Nawal Kishore Kharaiti Lal*[1], that it is not necessary for the validity of a notice calling for a return of the income under section 23 (2) served on a person as agent of a non-resident under section 43, that it should have been preceded not only by the notice of intimation prescribed by section 43, but also by an order declaring the person to be agent of the non-resident or treating him as such. The Income-tax Officer may postpone any final determination of the dispute until the time comes to make an assessment under section 23 of the Act. In our judgment, the same principle applies to a case in which in the assessment of the income of an association of persons a person is to be treated as a principal officer of that association. If the person described as a principal officer of an association is duly served with a notice under section 23 (2) in the manner prescribed by section 63 (2), an adjudication of his status as the principal officer before assessment proceedings may take place is not obligatory. The order assessing the association containing a finding that the person served is the principal officer is sufficient compliance with the requirements of the statute. It is open to the association to challenge the finding of the Income-tax Officer in appeal before the Appellate Assistant Commissioner and in further appeal to the Appellate Tribunal. But the order declaring him as the principal officer of an association of persons will not be deemed to be void merely because the proceeding for assessment was not preceded by a declaration of the status of the person treated as the principal officer.

The Appeals Nos. 1060-1064 of 1965 must also fail and are dismissed with costs. There will be one hearing fee in Appeals Nos. 1103-1107 of 1966 and one hearing fee in Appeals Nos. 1060-1064 of 1965.

V. S. *Appeals dismissed.*

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1. I.L.R. (1938) Lah. 129 : L.R. 65 I.A. 12 : 42 Cal. W.N. 417 : 40 Bom. L.R. 280 : (1938) 6 I.T.R. 61 : (1938) 1 M.L.J. 123 : A.I.R. 1938 P.C. 8.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.

Commissioner of Commercial Taxes, Board of Revenue, Madras and another, etc. .. *Appellants**

v.

Ramkishan Shrikishan Jhaver, etc. .. *Respondents.*

State of Kerala .. *Intervener.*

Madras General Sales Tax Act (I of 1959), section 41—Inspection, search and seizure—Inspection includes search—Constitutional validity—Search and seizure—Criminal Procedure Code—Provisions, applicable—Provision enabling recovery of tax before sale—Repugnant to scheme of Sales Tax Act—To be struck down.

Constitution—Legislative entries—Widest interpretation to be given—Ancillary and incidental provisions to effectuate and check evasion of tax.

Interpretation of Statutes—Proviso—Generally an exception to main enacting part—May be a substantive provision in exceptional cases.

The Officers of the Commercial Tax Department raided and searched the premises of a company and a suit case was seized and forcibly removed by the Officers who made the raid, in spite of the fact that they were informed that the box did not contain any papers or documents belonging to the company and its contents consisted of merely of personal effects of one of the managing directors of the company. The raid and search were made on information that one of the directors of the company had removed a box containing secret accounts relating to it. The High Court in a writ petition filed by the aggrieved person held that section 41 (2), (3) and (4) were unconstitutional as offending Article 19 (1) (*f*) and (*g*) of the Constitution. The State appealed.

Held, section 41 (4) and the two provisos enacted thereunder are repugnant to the entire scheme of the Act in so far as it provides for recovery of tax even before the first sale in the State which is the point of time in a large majority of cases for recovery of tax and hence must be struck down. Section 41 (2) and (3) are not violative of Article 19 (1) (*f*) and (*g*) of the Constitution. Section 41 (2) includes within it the power of search also.

It is true that generally speaking a power to inspect does not necessarily give power to search. But under section 41 (2) of the Act, the power has been given to inspect not merely accounts, registers, records and other documents maintained by a dealer and his goods but also to inspect his offices, shops, godowns, vessels and vehicles. It follows that the inspection will be for purposes of the Act *i.e.*, for the purposes of seeing that there is no evasion of tax. Therefore the power of search is implicit in section 41 (2) with reference both to the accounts, etc. maintained by a dealer and the goods in the possession of the dealer. Sub-section (2) does not give any power of inspecting the residential accommodation of the dealer and therefore it cannot be read as giving the power of search of the residential house for purposes of the Act. But where it is a case of business-*cum*-residence, the power of search will be available.

Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exception cases a proviso may be substantive provision itself. The proviso to section 41 (2) is of this exceptional nature. There is no provision in the main part of the sub-section for searching purely residential

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*C.As. Nos. 150 to 154 of 1967. 9th August, 1967.

premises. When the proviso provides for such search it is providing for something independent of the main part of the sub-section. Further the second part of the proviso which talks of searches made under this sub-section shows that the power of inspection provided in the main part of the sub-section is tantamount to a power of search. The proviso also shows that the power of search is implicit in the main part of the sub-section.

Section 41 (3) also bears out that the sub-section (2) must include the power of search for a seizure under sub-section (3) is not possible unless there is a search.

Assuming without deciding that the power to confiscate goods which are found on search and which are not entered in account books of the dealer is an ancillary power necessary for the purpose of stopping evasion of tax, clause (*a*) of the second proviso to section 41 (4) enabling the recovery of tax even before the sale, in addition to the penalty, is clearly repugnant to the general scheme of the Act which in the majority of the cases provides for recovery of tax at the point of first sale in the State.

Considering the fact that the legislature added this compulsory proviso later, it is clear that the legislature intended that the main part of the section and the second proviso should go together. Therefore the second proviso clause (*a*) cannot be held to be severable. Sub-section (4) would have to be struck down on the ground of repugnancy.

The fact that the Act gives power to Government to empower any officer to inspect and search is no reason to strike it down, for the Government will see that officers of proper status are empowered. All provisions contained in the Code of Criminal Procedure relating to searches would be applicable to searches under sub-section (2) of section 41. Sub-section (3) also contains safeguards and restrictions, if any, must be held to be reasonable restrictions. Section 41 (2) and (3) cannot be held to be violative of Article 19.

The entries in the various lists in Schedule 7 must be given the widest possible interpretation. While making law under any entry in the Schedule it is competent to the legislature to make all such incidental and ancillary provisions as may be necessary to effectuate the law and to check the evasion of the law.

Appeals from the Judgment and Order dated the 25th February, 1965, of the Madras High Court in Writ Petitions Nos. 1321, 1456, 1495, 1496 and 1553 of 1964*.

S. V. Gupte, Solicitor-General of India, (*V. Ramaswamy* and *A. V. Rangam*, Advocates, with him), for Appellants (In C. As. Nos. 150 to 153 of 1967).

K. N. Mudaliyar, Advocate-General for State of Madras (*V. Ramaswamy* and *A. V. Rangam*, Advocates, with him), for Appellant (In C. A. No. 154 of 1967).

N. C. Chatterjee, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Respondents (In C. As. Nos. 150, 151 and 154 of 1967.)

A. G. Pudissery, Advocate, for Intervener.

The Judgment of the Court was delivered by

Wanchoo, C. J.—These five appeals on certificates granted by the Madras High Court raise common questions of law and will be dealt with together. We shall give brief facts in one of the appeals (No.150 of 1967) arising out of Writ Petition No. 1321 of 1964 in order to understand the questions that fall to be decided in the present appeals. On 19th August, 1964, at about 5.00 P.M. the officers of the Commercial Tax Department (hereinafter referred to as the Department) raided the premises of Zenith Lamps and Electricals Ltd., (hereinafter referred to as the company). It is said that the premises were searched and a suit case was seized and forcibly removed by the officers who made the raid, inspite of the fact that they were informed that the box did not contain any papers or documents belonging to the company and its con-

* (1965) 2 I.T.J. 178 : (1965) 57 I.T.R. 664 : (1965) 16 S.T.C. 708.

tents consisted merely of personal effects of one of the managing directors, namely, Shri Ramkishan Shrikishan Jhaver. The raid and search were made by the authorities concerned on information that Shri Goenka, one of the directors of the company, had removed a box containing secret accounts relating to it. The main contention of the petitioner in support of his prayer that the articles seized should be returned to him was under three heads. It was first contended that on a proper construction of section 41 of the Madras General Sales Tax Act (1 of 1959) (hereinafter referred to as the Act), the officers of the Department had no authority to search the premises and seize either the account books or the goods found therein. Secondly, it was contended that if section 41 (4) authorised seizure and confiscation of goods, it was beyond the legislative competence of the State Legislature, for it could not be covered by item 54 of List 2 of the Seventh Schedule to the Constitution relating to "taxes on the sale or purchase of goods". Lastly, it was contended that if various provisions in section 41 were capable of being construed as authorising search and seizure, the provisions contained therein were unconstitutional in view of Article 19 (1) (*f*) and (*g*) of the Constitution.

It is not necessary to refer to the facts in the other petitions which have resulted in the other appeals before this Court because in those cases also there was search and seizure by the officers of the Department and their action is being attacked on the same grounds. All the petitions were opposed on behalf of the State Government and its case was firstly, that section 41 authorised search and seizure ; secondly, that the State Legislature was competent to enact section 41 (4) under item 54 of List 2 of the Seventh Schedule to the Constitution ; and thirdly, that the provisions in question did not offend Article 19 (1) (*f*) and (*g*) of the Constitution and were in any case protected by Article 19 (5) and (6).

The High Court held that section 41 (2) did not allow search being made thereunder, as it only provided for inspection, and that search was a different thing altogether from inspection. The High Court further held that if section 41 (2) provided for search it would be within the legislative competence of the State Legislature. The High Court took the view that the power of seizure and confiscation of goods contained in sub-section (4) could not be said to be ancillary and incidental to the power to tax sale or purchase of goods and therefore this provision was beyond the legislative competence of the State Legislature. Finally, the High Court held that sub-sections (2), (3) and (4) of section 4 were unconstitutional as they were unreasonable restrictions on the fundamental rights guaranteed under Article 19 (1) (*f*) and (*g*) of the Constitution. Besides the above, the High Court also found with respect to one of the petitions that the search warrant issued for the search of the residential house by the magistrate disclosed that the magistrate had not applied his mind at all to the necessity of the search of the residential house, for columns in the printed search warrant which should have been struck out were not so struck out. Further the gaps in the printed form which should have been filed in before the warrant was issued had not been filled in. From these two circumstances the High Court concluded that the search warrant for the residential house had been issued without the application of mind by the magistrate to the necessity of the search of the residential house. The High Court further found that section 41 (4) was not complied with strictly before confiscation was ordered and no proper opportunity was given to the dealer to show that the goods seized and confiscated were not accounted for in his accounts. In the result therefore the High Court allowed all the petitions and directed that the documents, things and goods covered by the petitions should be returned to the petitioners along with photographs, negatives, translations and notes made by the Department from the accounts, etc. The State of Madras then applied for and obtained certificates from the High Court to appeal to this Court and that is how the matter has come before us.

The same three questions which were raised before the High Court have been raised before us on behalf of the appellant. Before, however, we deal with them we would briefly refer to the provisions of the Act which are material for our purposes. Section 3 is the main charging section which provides that :

"every dealer whose total turnover for a year is not less than Rs. 10,000........shall pay tax for each year at the rate of 2 per cent. of his taxable turnover."

The point at which tax has to be paid on single point taxable goods is indicated in the First Schedule to the Act and that will show that in a large majority of cases the tax has to be paid at the point of first sale in the State, though in some cases it has to be paid at the point of first purchase or of last purchase in the State. Section 4 is another charging section in respect of declared goods and the Second Schedule to the Act deals with the point at which tax has to be paid in respect of such goods. That Schedule also shows that in a majority of cases the tax has to be paid at the point of first sale in the State, though in some cases it has to be paid at the point of first purchase in the State or the last purchase in the State. Certain goods are exempt from tax under the Act as provided in the Third Schedule and do not thus form part of the taxable turnover, though they will be a part of the turnover for purposes of calculating the total turnover per year. The Act provides for registration of firms and of dealers, for appointment of officers, for collection of tax, for the levy of penalty, and for appeals and revisions. It also casts a duty on dealers to maintain a true and correct account. Then comes section 41 with which we are particularly concerned. It is in these terms :

"(1) Any officer empowered by the Government in this behalf may, for the purpose of this Act, require any dealer to produce before him the accounts, registers, records and other documents and to furnish any other information relating to his business.

(2) All accounts, registers, records and other documents maintained by a dealer in the course of his business, the goods in his possession and his offices, shops, godowns, vessels or vehicles shall be open to inspection at all reasonable times by such officer :

Provided that no residential accommodation (not being a place of business-*cum*-residence) shall be entered into and searched by such officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area, and all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1898 (Central Act V of 1898).

(3) If any such officer has reason to suspect that any dealer is attempting to evade the payment of any tax, fee or other amount due from him under this Act he may, for reasons to be recorded in writing, seize such accounts, registers, records or other documents of the dealer as he may consider necessary, and shall give the dealer a receipt for the same. The accounts, registers, records and documents so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceeding under this Act :

Provided that such accounts, registers and documents shall not be retained for more than thirty days at a time except with the permission of the next higher authority.

(4) Any such officer shall have power to seize and confiscate any goods which are found in any office, shop, godown, vessel, vehicle, or any other place of business or any building or place of the dealer, but not accounted for by the dealer in his accounts, registers, records and other documents maintained in the course of his business:

Provided that before ordering the confiscation of goods under this sub-section the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner:

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation—

(*a*) in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater ; and

(*b*) in other cases, a sum of money not exceeding one thousand rupees.

Explanation.—It shall be open to the Government to empower different classes of officers for the purpose of taking action under sub-sections (1), (2) and (3)."

It will be seen from the above brief review of the provisions of the Act that it mainly deals with sales tax to be levied at the point of first sale in the State, though there is also provision for purchase tax in certain cases. It empowers any officer, empowered by the Government in this behalf, to require any dealer to produce before him the accounts, registers, records and other documents and to furnish any other information relating to his business. It may be mentioned here that the Government has empowered all officers of the Department not lower in rank than the Assistant Commercial Tax Officer, all officers of the Revenue Department not lower in rank than an Inspector and all officers of the Police Department not lower in rank

than a Sub-Inspector, to act under section 41, sub-sections (2) to (4). Presumably, so far as sub-section (1) is concerned, only officers of the Department can act under the provision. However, there is no dispute with respect to that sub-section as the power has to be exercised for the purpose of the Act *i.e.*, with reference to assessment proceedings at all stages including recovery of tax and prosecution for offences. It is not disputed that the power under sub-section (1) can only be exercised to require a dealer to produce accounts, etc., relating to his business and not that of anybody else.

The main dispute centres round the interpretation of sub-section (2) of section 41. The contention on behalf of the respondents is that that provisions did not authorise search of premises but merely provided for inspection thereof at all reasonable times by the empowered officer. We shall first deal with the main part of sub-section (2) to see what it provides without reference to the proviso. Clearly sub-section (2) provides for three things, namely—(*i*) all accounts, registers, records and other documents maintained by a dealer in the course of his business shall be open to inspection at all reasonable times; (*ii*) the goods in the possession of the dealer shall also be open to inspection; and (*iii*) the dealer's offices, shops, godowns, vessels or vehicles shall also be open to inspection. There is no doubt that there are no specific words in sub-section (2) giving power of search. But if we read the three powers conferred by sub-section (2) it should not be difficult to hold that search is included therein. It will be seen that sub-section (2) differs from sub-section (1) in one respect. In sub-section (1) the dealer is required to produce his accounts, etc., and to furnish other information relating to his business and it is left to the dealer to produce what accounts he may say he has. The legislature was however cognizant of the fact that a dealer may not produce all accounts or furnish all information even though required to do so under sub-section (1). Therefore, sub-section (2) provides that all accounts, etc., of the dealer shall be open to inspection. It also provides that the dealer's offices, shops, godowns, vessels or vehicles shall be open to inspection. It is true that generally speaking a power to inspect does not necessarily give power to search. But where, as in this case, the power has been given to inspect not merely accounts, registers, records and other documents maintained by a dealer but also to inspect his offices, shops, godowns, vessels or vehicles, it follows that the empowered officer would have the right to enter the offices, etc., for purposes of inspection. Naturally his inspection will be for purposes of the Act *i.e.*, for the purposes of seeing that there is no evasion of tax. If therefore during his inspection of offices, etc., the empowered officer finds any accounts, registers, records or other documents in the shop, those accounts, etc., will also be open to inspection. Reading therefore these two provisions together, it is clear that the empowered officer has the right to enter the offices, etc., and to inspect them, and if on such inspection he finds accounts, etc., he has also the power to inspect them and to see if they relate to the business. These two powers taken together in our opinion means that the empowered officer has the power to search the office, etc., and inspect accounts, etc., found therein. Though therefore the word " search " has not been used in sub-section (2) these two powers of entering the offices, etc., forin spection and of inspecting every kind of account maintained by a dealer with respect to his business together amount to giving the officer concerned the powers to enter and search the offices, etc., and if he finds any account in the offices, shops, etc., to inspect them. Otherwise we can see no sense in the legislature giving power to the empowered officer to enter the offices, etc., for the purpose of inspection as the officer concerned would only do so for the purpose of finding out all accounts, etc., maintained by the dealer and if necessary to inspect them for the purposes of the Act. We cannot therefore agree with the High Court that there is no power of search whatsoever in sub-section (2) because the sub-section in terms does not provide for search.

Similarly the officer has been given the power to inspect the goods in the possession of the dealer. He has also the power to enter the dealer's offices, etc., for the purpose of such inspection. Combining these two powers together it follows on the same reasoning that the officer has the power to search for the goods also and to

inspect them if found in the offices of the dealer. We have therefore no hesitation in coming to the conclusion that the power of search is implicit in sub-section (2) with reference both to the accounts, etc., maintained by the dealer and the goods in the possession of the dealer. It also seems to us that this power in sub-section (2) is confined to offices, shops, godowns, vessels and vehicles of the dealer and does not go beyond them. It is urged on behalf of the appellant that as the officer is entitled to inspect all accounts, etc., maintained by the dealer he can search for them even in the dealer's residential premises. But we do not agree with this contention, for we have found the power of search by reading the power of inspection of offices, etc., with the power of inspection of accounts, etc., and the power of inspection of goods. Sub-section (2) does not give any power of inspecting the residential accommodation of the dealer and therefore it cannot be read as giving the power of search of the residential house for purposes of the Act. But where it is a case of business-*cum*-residence, the power of search will be there, for under sub-section (2) all offices, shops, godowns, vessels or vehicles of the dealer are open to inspection.

Let us now see what light is thrown on the interpretation of sub-section (2) by the proviso and whether the interpretation we have put on the main part of sub-section (2) is supported by the proviso. The proviso lays down that (*i*) no purely residential accommodation shall be entered into and searched by such officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area; and (*ii*) that all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1898. The latter part of the proviso clearly shows that the main part of sub-section (2) contemplates searches, for it refers to all searches made under this sub-section. If the reference in the second part of the proviso was confined only to searches made under the first part of the proviso, the words would have been "all searches under this proviso shall be made in accordance with the provisions of the Code of Criminal Procedure." The proviso therefore bears out the construction that we have put on the main part of sub-section (2). But it is urged that a proviso carves out something which is already contained in the main provision and the main provision at any rate does not provide for search of a purely residential accommodation. Therefore the proviso is otiose. That is what the High Court also seems to have held. Generally speaking, it is true that the proviso is an exception to the main part of the section ; but it is recognised that in exceptional cases a proviso may be substantive provision itself. We may in this connection refer to *Rhondda Urban District Council* v. *Taff Vale Railway Co.*[1], where section 51 of the Act there under consideration was framed as a proviso to preceding sections. The Lord Chancellor however pointed out that:

> "though section 51 was framed as a proviso upon preceding sections, but it is true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before."

Again in *Commissioner of Income-tax* v. *Nandlal Bhandari & Sons*[2], it was observed that :

> "Though ordinarily a proviso restricts rather than enlarges the meaning of the provision to which it is appended, at times the legislature embodies a substantive provision in a proviso. The question whether a proviso is by way of an exception or a condition to the substantive provision, or whether it is in itself a substantive provision, must be determined on the substance of the proviso and not its form."

Finally in *State of Rajasthan* v. *Leela Jain*[3], the question arose whether the proviso in the Act under consideration there was a limiting provision to the main provision or was a substantive provision in itself. This Court observed that :

> "So far as general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part."

But it was further observed that the proviso in that particular case was really not a proviso in the accepted sense but an independent legislative provision by which

1. L.R. (1909) A.C. 253.
2. (1963) 47 I.T.R. 803.
3. (1966) 1 S.C.J. 37 : (1965) I S.C.R. 276 : A.I.R. 1965 S.C. 1296.

to a remedy which was prohibited by the main part of the section, an alternative was provided.

These three cases show that in exceptional circumstances a proviso may not be really a proviso in the accepted sense but may be a substantive provision itself. It seems to us that the proviso under consideration now is of this exceptional nature. As we have already held, there is no provision in the main part of the sub-section for searching purely residential premises. Therefore when the proviso provides for such search it is providing for something independent of the main part of the sub-section. Further the second part of the proviso which talks of searches made *under this sub-section* shows that the power of inspection provided in the main part of the sub-section is tantamount to a power of search. We have already come to that conclusion independent of the proviso. All that we need say here is that the proviso also shows that that interpretation is correct. We may add that we are not precluded from looking at the proviso in interpreting the main part of the sub-section. We may in this connection refer to the following passage in Maxwell on Interpretation of Statutes, Eleventh Edition at page 155 where it is observed :—

"There is no rule that the first or enacting part is to be construed without reference to the proviso

The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.

The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together is to prevail."

But as we have said already even without looking at the proviso, our conclusion is that the main part of sub-section (2) provides for searches and the proviso merely enforces that conclusion. We therefore cannot agree with the High Court that sub-section (2) does not provide for search of the business premises of a dealer, in the shape of offices, etc.

Then we come to sub-section (3). That provides for the seizure of accounts, etc., if the empowered officer has reason to suspect that any dealer is attempting to evade the payment of any tax, fee or other amount due from him under the Act. If he has such reason he may for reasons to be recorded in writing seize such accounts, etc. Now if sub-section (2) gives power of search, sub-section (3) merely provides further power to seize the accounts, etc., found on such search. We have already held that sub-section (2) gives the power of search and in that case sub-section (3) is merely complementary to sub-section (2) and gives the empowered officer the power to seize the accounts found in certain circumstances. If anything, sub-section (3) also bears out that sub-section (2) must include the power of search, for a seizure under sub-section (3) is not possible unless there is a search. Reading therefore sub-section (2), its proviso and sub-section (3) together we are of opinion that they provide for search and seizure without warrant except that if the place searched is purely residential accommodation it cannot be searched without a search warrant from a Magistrate. It naturally follows that if it cannot be searched without a search warrant it is not open to the empowered officer to seize anything from a residential accommodation for he cannot enter and search it unless he has a warrant from a Magistrate to do so.

The next question relates to the legislative competence of the State legislature to enact sub-section (4). This sub-section provides for seizure and confiscation of any goods found in any office, etc., including purely residential accommodation, after search, if they are not accounted for in the accounts maintained in the course of the dealer's business. The sub-section thus completes the process which starts with sub-section (1) and gives authority to the empowered officer to seize and confiscate goods of the nature indicated therein. The contention on behalf of the respondents is that the power of confiscation provided by sub-section (4) was not within the competence of the State Legislature under item 54, List 2, of the Seventh Schedule relating to tax on sales and purchase of goods. On the other hand, the appellant justifies the power to seize and confiscate goods on the ground that it is

ancillary and incidental to the power to tax, for it is necessary to have such power in order to check evasion of tax and make it unprofitable. The High Court held that the Act was not a law on goods and that a provision for confiscation of goods found on search was neither incidental nor ancillary to the power to tax contained in item 54, List 2 of the Seventh Schedule. Now it has not been and cannot be disputed that the entries in the various Lists of the Seventh Schedule must be given the widest possible interpretation. It is also not in doubt that while making law under any entry in the Schedule it is competent to the legislature to make all such incidental and ancillary provisions as may be necessary to effectuate the law; particularly it cannot be disputed that in the case of a taxing statute it is open to the legislature to enact provisions which would check evasion of tax. It is under this power to check evasion that provision for search and seizure is made in many taxing statutes. It must therefore be held that the legislature has power to provide for search and seizure in connection with taxation laws in order that evasion may be checked. It is further urged on behalf of the appellant that confiscation of goods which are not entered in accounts is merely a provision of ancillary nature to check evasion of tax by making it unprofitable for dealers to secrete goods in which they are dealing. Reliance in this connection is placed on *K.S. Papanna and another* v. *Deputy Commercial Tax Officer, Guntakal*[1], where the Andhra Pradesh High Court upheld an analogous provision in the Andhra Pradesh General Sales Tax Act (VI of 1957), in section 28 (6).

We do not propose in the present case to decide the general question whether a power to confiscate goods which are found on search and which are not entered in account books of the dealer is an ancillary power necessary for the purpose of stopping evasion of tax. Assuming that is so, we have still to see whether sub-section (4) of the Act can be upheld read along with the second proviso thereof. It may be added that there is no such provision as the second proviso in section 28 of the Andhra Pradesh General Sales Tax Act. We do not therefore propose to express any opinion as to the correctness of the above decision of the Andhra Pradesh High Court. Sub-section (4) of section 41, before it was amended by the Madras General Sales Tax (Second Amendment) Act, from 1st April, 1961, had only the first proviso with respect to giving an opportunity of being heard and making an enquiry in the matter before ordering confiscation. By the amendment of 1961, the second proviso was added. That provides that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation, in cases where the goods are taxable under the Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater. This provision clearly requires the officer ordering confiscation to do two things—(*i*) to order the person concerned to pay the tax recoverable, and (*ii*) to pay a sum of money not exceeding on thousand rupees or double the amount of tax recoverable, whichever is greater. We have already indicated that in a large majority of cases covered by the Act the tax is payable at the point of first sale in the State. But under clause (*a*) of the second proviso the tax is ordered to be recovered even before the sale, in addition to the penalty not exceeding Rs. 1,000 or double the amount of tax recoverable whichever is greater. Therefore clause (*a*) of the second proviso is clearly repugnant to the general scheme of the Act which in the majority of the cases provides for recovery of tax at the point of first sale in the State. In view of this repugnancy one or other of these two provisions must fall. Clearly it is clause (*a*) in the proviso which under the circumstances must fall, for we cannot hold that the entire Act must fall because of this inconsistency with respect to recovery of tax under clause (*a*) of the second proviso even before the taxable event occurs in the large majority of cases which would be covered by the Act. We are therefore of opinion that clause (*a*) of the second proviso being repugnant to the entire scheme of the Act, in so far as it provides for recovery of tax even before the first sale in the State which is the point of time in a large majority of cases for recovery of tax, must fall, on the ground of repugnancy.

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1. (1967) 2 An.W.R. 71 : (1967) 19 S.T.C. 506.

It is next urged that in any case the second proviso is severable and therefore only this proviso would fall and not the main part of sub-section (4). We are however of opinion that clause (*a*) of second proviso is not severable. We have already indicated that originally the second proviso was not there in the Act. It was brought in by the amendment of 1961 and it compels the officer to give the option, and thus compels recovery of tax even in those cases where the tax is recoverable only at the first point of sale in the State which naturally has not occurred in cases of goods seized from the dealer himself. Considering the fact that the legislature added this compulsory proviso later, it is clear that the legislature intended that the main part of the section and the second proviso should go together. It is difficult to hold therefore that after the introduction of the second proviso in 1961, the legislature could have intended that the main part of sub-section (4) should stand by itself. We are therefore of opinion that sub-section (4) with the two provisos must fall on this narrow ground. We therefore agree with the High Court and strike down sub-section (4) but for reasons different from those which commended themselves to the High Court.

Then we come to the question whether sub-sections (2) and (3) of section 41 of the Act which have been struck down by the High Court on the ground that they are unreasonable restrictions on the right to hold property and to carry on trade have been correctly struck down. The main reason which impelled the High Court to strike down sub-section (2) was that there was no safeguard provided for search made thereunder. The High Court held that section 165 of the Code of Criminal Procedure did not apply to searches made under sub-section (2). It also held that the State Government was given the power to empower any officer to make a search under sub-section (2) and this meant that even an officer of low status could be empowered. Consequently the High Court struck down sub-section (2) on the ground that it gave arbitrary power of search which could be made even by an officer of low status. It is true that search under this sub-section can be made by any officer empowered by Government in this behalf; but we have no reason to think that Government will not empower officers of proper status to make searches. In this very case, we find that the Government empowered an Assistant Commercial Tax Officer, a Revenue Inspector and a Sub-Inspector of Police to make searches. Considering the large number of dealers who are covered by the Act, it cannot be said that these officers are of such low status that they cannot be depended upon to make a search with due care and caution. We cannot also forget that in a case of this kind the Government cannot find sufficient number of officers of what may be called high status to make searches, for dealers who may be covered by the Act may be legion throughout the State, and if such searches could only be made by high officers there would not be enough officers available to do so. The fact that the Act gives power to Government to empower any officer is therefore no reason to strike it down for, as we have said, the Government will see that officers of proper status are empowered. Nor do we think that an Assistant Commercial Tax Officer or an Inspector of Revenue Department or a Sub-Inspector of Police Department is not an officer of proper status to make searches under this provision.

We are also of opinion that though sub-section (2) itself provides no safeguards and might have been open to objection on that ground, there is a provision in the proviso to sub-section (2) which lays down that all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure. Therefore, the provisions of the Code of Criminal Procedure, so far as may be, apply to all searches made under sub-section (2). It appears that in the High Court, the parties as well as the Court assumed that section 165 of the Code of Criminal Procedure would not apply to searches under sub-section (2). We cannot see any warrant for this assumption. The proviso clearly lays down that all searches made under this sub-section, so far as may be, shall be made in accordance with the provisions of the Code of Criminal Procedure. Thus all provisions contained in the Code of Criminal Procedure relating to searches would be applicable to searches under sub-section (2), so far as may be. Some of these provisions are

contained in Chapter VII but one such provision is contained in section 165. It is true that that section specifically refers to an officer-in-charge of a Police Station or a police officer making an investigation. But when the proviso applies the provisions of the Code of Criminal Procedure to all searches made under this sub-section, as far as may be possible, we see no reason why section 165 should not apply *mutatis mutandis* to searches made under sub-section (2). We are therefore of opinion that safeguards provided in section 165 also apply to searches made under sub-section (2). These safeguards are—(i) the empowered officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction, (ii) he must be of the opinion that such thing cannot be otherwise got without undue delay, (iii) he must record in writing the grounds of his belief, and (iv) he must specify in such writing so far as possible the thing for which search is to be made. After he has done these things, he can make the search. These safeguards, which in our opinion apply to searches under sub-section (2) also clearly show that the power to search under sub-section (2) is not arbitrary. In view of these safeguards and other safeguards provided in Chapter VII of the Code of Criminal Procedure, which also apply so far as may be to searches made under sub-section (2), we can see no reason to hold that the restriction, if any, on the right to hold property and to carry on trade, by the search provided in sub-section (2) is not a reasonable restriction keeping in view the object of the search, namely, prevention of evasion of tax.

Next we come to sub-section (3), which as we have already stated, is complementary to sub-section (2). It provides in addition to the safeguards which have to be complied with when a search is made under sub-section (2), that the officer may seize accounts, etc. if he has reason to suspect that any dealer is attempting to evade the payment of any tax, etc. due from him under the Act. It also provides that the officer has to record his reasons in writing and we are of opinion that these reasons have to be recorded before the accounts are seized. It further provides that the dealer shall be given a receipt, and this means that the receipt must be given as and when the accounts, etc. are seized. Finally it provides that these accounts, etc. shall be retained by such officer so long as may be necessary for their examination and for any enquiry or proceeding under the Act. These in our opinion are sufficient safeguards and the restriction, if any, on the right to hold property and the right to carry on trade by sub-section (3) must therefore be held to be a reasonable restriction. We may add that the proviso to sub-section (3) has fixed the period for which the officer seizing accounts can keep them, namely, 30 days at a time, and if he wants to keep them for more than thirty days he has to take the permission of the next higher officer. This is an additional safeguard entitling the dealer concerned to get back the accounts after every 30 days, unless a higher officer has permitted the retention of accounts for a period longer than 30 days. We cannot therefore agree with the High Court that sub-sections (2) and (3) of section 41 of the Act are unreasonable restrictions on the right to hold property or carry on trade for reasons indicated, We are of opinion that they are reasonable restrictions which are protected by clauses (5) and (6) of Article 19 of the Constitution.

We now proceed to consider what order should be passed in the appeals in the view we have taken about the interpretation and validity of sub-sections (2) and (3) of section 41 of the Act. We have already indicated that the High Court held that the warrant issued by the Magistrate for search of the residential accommodation was bad because it showed that the Magistrate had not applied his mind to the question of issuing it, inasmuch as there were portions which should have been struck out from the printed form and gaps which should have been filled in. But this was not done. That conclusion of the High Court has not been challenged before us. The High Court has further held that a proper and reasonable opportunity was not given to the persons concerned to show that the goods seized were not properly accounted for in their account-books, though this finding is not material now for we have held that sub-section (4) falls in its entirety. It follows therefore that anything

recovered from the search of the residential accommodation on the basis of this defective warrant must be returned. It also follows that anything confiscated must also be returned, as we have held that sub-section (4) must fall. As to the accounts. etc. said to have been seized, it appears to us that the safeguards provided under section 165 of the Code of Criminal Procedure do not appear to have been followed when the search was made for the simple reason that every body thought that that provision was not applicable to a search under sub-section (2). Therefore, as the safeguards provided in section 165 of the Code of Criminal Procedure were not followed, anything recovered on a defective search of this kind must be returned. It follows therefore that the final order of the High Court allowing the writ petitions must stand, though we do not agree with the interpretation of the High Court with respect to sub-section (2) and the finding of the High Court that sub-sections (2) and (3) are unconstitutional on the ground of their being unreasonable restrictions on the right to hold property and to carry on trade. The appeals therefore fail and are hereby dismissed. In view of our decision on the main question of law we order parties to bear their own costs in all the appeals.

V. S. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

Bhanji Bagawandas .. *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 34 (1) (*a*), 34 (3), *second proviso—Back assessment—Bar of limitation—Assessment year in question in appeal or revision—Finding or direction to relate to the year in question—No saving of limitation in respect of previous assessment year—Applicability of the Amendment Act I of* 1959.

Words and phrases—" Finding "—" Direction."

Income-tax (*Amendment*) *Act* (*I of* 1959).

The Appellate Assistant Commissioner allowed an appeal preferred by the assessee against the order of the Officer including a sum as income from undisclosed sources, for the assessment year 1949-50. He held that as the credit appeared in the account books on 13th November, 1947, *i.e.*, in the financial year 1947-48 which is the previous year for the assessment year 1948-49, the sum was not assessable for the assessment year 1949-50. On 3rd November, 1958, the Income-tax Officer issued a notice under section 34 (1) (*a*) of the Act to the assessee for the assessment year 1948-49. The Tribunal and the High Court in reference held, the proceeding was not barred by limitation. The High Court held that the words " finding " in the proviso to section 34 (3) of the Act should be given a wide meaning and hence the assessment cannot be impugned. The Revenue did not seek to sustain the assessment with reference to section 2 of the Income-tax (Amendment) Act (I of 1959). The assessee appealed.

Held, the appeal has to be allowed and remanded to the High Court for examining the applicability of the Amendment Act I of 1959 to the assessment in question.

The expressions "finding" and "direction" in the second proviso to section 34 (3) of the Act, meant respectively, a finding necessary for giving relief in respect of the assessment for the year in question, and a direction which the appellate or revisional authority, as the case may be, was empowered to give under the sections mentioned in that proviso. A "finding" therefore, could only be that which was necessary for the disposal of an appeal in respect of an assessment of a particular

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* C.A. No. 1984 of 1966. 18th July, 1967.

year. The Appellate Commisioner might hold, on the evidence, that the income shown by the assessee was not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context was that the income did not belong to the relevant year. He might incidentally find that the income belonged to another year, but that was not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The second proviso to section 34 (3) did not save the time limit prescribed under section 34 (1) in respect of an escaped assessment of a year other than that which was the subject-matter of the appeal or revision, as the case may be.

Section 66 (1) only requires that the question of law which is referred to the High Court and which the High Court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been urged before the Tribunal and it will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66 (1) of the Act.

Where the question raised in the reference was whether the assessment made was saved from the bar of limitation under section 34 (3), second proviso, the applicability of the Amendment Act I of 1959 would be only one aspect of the question, and though the same was not raised by the Revenue before the Tribunal or the High Court, it could be allowed to be raised in the Supreme Court as a new contention.

Appeal from the Judgment and Order dated the 2nd January, 1964, of the Madras High Court in T. C. No. 153 of 1962.

S. Swaminathan and *R. Gopalakrishnan*, Advocates, for Appellant.

Veda Vyasa, Senior Advocate (*A. N. Kirpal, R. N. Sachthey* and *S. P. Nayar*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought from the judgment of the Madras High Court dated 2nd January, 1964, in Tax Case No. 153 of 1962.

The assessment year involved in this appeal is 1948-49, the corresponding previous year being the financial year 1947-48. For the accounting period from 13th November, 1947 to 1st November, 1948, which was the corresponding previous year for the assessment year 1949-50 there was shown a credit of Rs. 25,000 in the capital account of the appellant. On 13th November, 1947, this amount was credited in the books of the appellant. On 30th October, 1948, this amount was transferred to the account of one Amrithlal Ranchoodas, the father-in-law of the appellant. The Income-tax Officer included the said amount as income of the appellant from undisclosed sources in the assessment for the assessment year 1949-50. On appeal to the Appellate Assistant Commissioner the appellant contended that the amount could not be included in the assessment year 1949-50 because the credit appeared prior to 31st March, 1948. The Appellate Assistant Commissioner allowed the appeal holding that the credit came into the books of the appellant on 13th November, 1947, *i.e.*, in the financial year 1947-48 which is the previous year for the assessment year 1948-49. On this finding, the Appellate Assistant Commissioner deleted the addition of Rs. 25,000 from the assessment of the appellant for the year 1949-50. In doing so, the Appellate Assistant Commissioner followed the decision in *Commissioner of Income-tax* v. *P. Daralia and Sons*[1]. Consequently, on 3rd November, 1958, the Income-tax Officer issued a notice under section 34 (1) (*a*) of the Income-tax Act, 1922 (hereinafter referred to as the "Act") to the appellant for the assessment year 1948-49. By his order dated 20th April, 1959, he rejected the contention of the appellant that the assessment was barred by limitation and assessed the sum of Rs. 25,000, as income from other sources. The appellant took the matter in appeal to the Apellate Assistant Commissioner who,

1. (1955) 27 I.T.R. 515 : A.I.R. 1955 Pat. 478.

by his order dated 23rd February, 1960, allowed the appeal. He took the view that there was no finding in the order of the Appellate Assistant Commissioner that the credit represented the income of the appellant or that the same credit should be assessed in the assessment year 1948-49. He further held that the notice under section 34 issued on 3rd November, 1958, was bad in law and was not saved by the second proviso to section 34 (3) of the Act. The Commissioner of Income-tax preferred an appeal against the order of the Appellate Assistant Commissioner to the Income-tax Appellate Tribunal which allowed the appeal, holding that "the order of the Appellate Assistant Commissioner in the appeal against the assessment for 1949-50 should be taken to contain a finding that the sum of Rs. 25,000 represented income of the assessee to be considered in the assessment year 1948-49." At the instance of the appellant the Appellate Tribunal referred the following questions of law for the opinion of the High Court under section 66 (1) of the Act:

"(1) Whether on the facts and in the circumstances of the case, the proceedings initiated against the assessee for the assessment year 1948-49 under section 34 and the assessment for the said year are barred by limitation and hence not lawful?

(2) Whether the proceedings initiated against the assessee for the assessment year 1948-49 under section 34 and the assessment made under section 34 for the assessment year 1948-49 could be justified in law as for the purpose of giving effect to a finding or directions in the order of the Appellate Assistant Commissioner in I.T.A. No. 134 of 1958-59?

(3) Whether on the facts and in the circumstances of the case, the assessment made is saved from the bar of limitation under the second proviso to section 34 (3)?"

By its judgment dated 2nd January, 1964, the High Court answered the questions in favour of the respondent and against the appellant. The High Court followed an earlier decision in *A. S. Khader Ismail* v. *Income-tax Officer*[1], in which it had held that the word "finding" in the proviso to section 34 (3) of the Act must be given a wide significance so as to include not only findings necessary for the disposal of the appeal but it would apply to cases where it is held that the income in question was in respect of an earlier year which was not the subject-matter of the appeal before the appellate authority.

On behalf of the appellant Mr. Swaminathan put forward the argument that the decision of the High Court is contrary to the view taken by this Court in *Income-tax Officer, A Ward, Sitapur* v. *Murlidhar Bhagwan Das*[2], in which it was held that the expressions "finding" and "direction", in the second proviso to section 34 (3), meant respectively, a finding necessary for giving relief in respect of the assessment for the year in question, and a direction which the appellate or revisional authority, as the case may be, was empowered to give under the sections mentioned in that proviso. A "finding", therefore, could only be that which was necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner might hold, on the evidence, that the income shown by the assessee was not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context was that the income did not belong to the relevant year. He might incidentally find that the income belonged to another year, but that was not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. It was further held that the second proviso to section 34 (3) did not save the time-limit prescribed under section 34 (1) in respect of an escaped assessment of a year other than that which was the subject-matter of the appeal or revision, as the case may be, and accordingly the notice issued under section 34 (1) (*a*) in that case was barred by limitation and was not saved by the second proviso to section 34 (3). In the course of its judgment this Court overruled the judgment of the Madras High Court in *A. S. Khader Ismail* v. *Income-tax Officer*[1]. It follows therefore that the view taken by the High Court in the present case is not correct in law and must be overruled.

On behalf of the respondent, however, Mr. Veda Vyasa contended that in answering the reference the effect of section 2 of the Income-tax (Amendment) Act

1. (1963) 47 I.T.R. 16.
2. (1964) 1 I.T.J. 579 : (1964) 6 S.C.R. 411 : (1964) 1 S.C.J. 583 : (1964) 52 I.T.R. 335 : A.I.R. 1965 S.C. 342.

(I of 1959) must be taken into consideration and in view of the amendment made by that section of the amending Act the question referred to the High Court must be answered necessarily against the appellant. Section 2 of the Amendment Act, 1959 inserted in section 34 of the Act a new sub-section (4) which provides :

> " A notice under clause (*a*) of sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that sub-section before its amendment by clause (*a*) of section 18 of the Finance Act (XVIII of 1956) had expired in respect of the year to which the notice relates."

Section 4 of the Amending Act, 1959 read as follows :

> " No notice issued under clause (*a*) of sub-section (1) of section 34 of the Principal Act at any time before the commencement of this Act and no assessment, re-assessment or settlement made or other proceeding taken in consequence of such notice shall be called in question in any Court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or re-assessment was made the time within which such notice should have been issued or the assessment or re-assessment should have been made under that section as in force before its amendment by clause (*a*) of section 18 of the Finance Act (XVIII of 1956) had expired."

Mr. Veda Vyasa referred to the decision of the Bombay High Court in *Onkarmal Meghraj* v. *Commissioner of Income-tax, Bombay*-I[1] in which it was held that there was nothing in section 2 or 4 of the Amendment Act of 1959 to restrict the terms of the words "at any time" occurring in section 4 of that Act as meaning "at any time after 1st April, 1956" *viz.*, the date on which the amendments made by the Finance Act, 1956, came into force and there was nothing in the provisions of the Amendment Act of 1959 which limited the retrospective operation of section 4. It was also held that since the enactment of the Amendment Act of 1959 a notice issued after 1st April, 1956, for reopening an assessment, by virtue of section 4, could not permitted to be called in question on the ground that the notice was not issued within the period prescribed by the unamended section 34 (1) (*a*). On behalf of the respondent reference was also made to the decision of this Court in *S. C. Prashar* v. *Vasantsen Dwarkadas*[2], in which it was held that section 4 of the Amendment Act, 1959 operated on and validated, notices issued under section 34 (1) (*a*) as amended in 1948 even earlier than 1st April 1956, in other words, in respect of assessment years prior to 31st March, 1956, and therefore notices issued under section 34 (1) (*a*) of the Income-tax Act before 1st April, 1956, could not be challenged on the ground that they were issued beyond the time of eight years from the respective assessment years prescribed by the 1948 amendment. On behalf of the appellant Mr. Swaminathan raised the objection that the point was not taken up by the respondent in the High Court, nor was there any reference to it in the statement of the case filed by the respondent. It was also contended that the point raised was outside the scope of the questions of law referred by the Appellate Tribunal to the High Court. We do not think there is any substance in the objection raised on behalf of the appellant. One of the questions referred to the High Court is " whether on the facts and in the circumstances of the case, the assessment made is saved from the bar of limitation under the second proviso to section 34 (3) ?" It is true that the impact of the Amending Act (I of 1959), was not raised before the Appellate Tribunal or before the High Court, but it is not a separate question by itself and is only an aspect of the question of limitation which has already been referred by the Appellate Tribunal to the High Court. As pointed out in *Commissioner of Income-tax, Bombay* v. *Scindia Steam Navigation Co. Ltd.*,[3] the question of law referred to the High Court under section 66 may be a simple one having its impact on one point or it might be a complex one, involving more than one aspect and requiring to be tackled from different standpoints. All that section 66 (1) requires is that the question of law which is referred to the High Court and which the High Court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued

1. (1959) Bom. L.R. 1373 : I.L.R. (1960) Bom. 124 : (1960) 38 I.T.R. 369 : A.I.R. 1960 Bom. 163.
2. (1963) 1 S.C.J. 687 : (1964) 1 S.C.R. 29 : A.I.R. 1963 S.C. 1356 : (1963) 49 I.T.R. 1 (S.C.).
3. (1962) 2 S.C.J. 322 : (1962) 1 S.C.R. 788 : (1961) 42 I.T.R. 589 : A.I.R. 1961 S.C. 1633.

before the Tribunal, and it will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66 (1) of the Act. In our opinion, the argument of the respondent with regard to the legal effect of the Amending Act (I of 1959) is within the frame-work of the question already referred to the High Court and it is therefore competent to this Court, in a case of this description, to allow a new contention to be advanced.

It is, however, necessary that the case should be remanded to the High Court for examining the question of law referred to it after considering the impact of the Amending Act (I of 1959).

For these reasons we allow this appeal, set aside the judgment of the High Court dated 2nd January, 1964, and remand the case to it for further hearing and answering the reference in the light of the Income-tax Amendment Act 1 of 1959. In the circumstances of the case we direct that the respondent should pay the cost of this appeal in this Court.

V.S. ——— *Allowed and remanded.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH AND C. A. VAIDIALINGAM, JJ.

The State of Andhra Pradesh .. *Appellant**

v.

Madiga Boosenna and others .. *Respondents.*

Andhra Pradesh (Andhra Area) Prohibition Act (X of 1937), section 4 (1) (a)—Nature of proof under.

In order to sustain a conviction under section 4 (1) (*a*) of the Andhra Pradesh Prohibition Act, 1937, the prosecution will have to establish two things: (1) that the article seized from the accused is 'liquor' as defined under section 3 (9) of the Act and (2) that the accused transported the same. A general statement by the Prohibition Inspector that strong smell of alcohol emanated from the tins which were pierced open is not enough to prove that the contents were prohibited liquor as defined by the Act. Merely trusting to the smelling sense of the Prohibition Officers and basing a conviction on such opinion cannot justify a conviction. Better proof by a technical person, who has considered the matter from a scientific point of view is not only desirable but even necessary to establish that the article seized is one coming within the definition of liquor.

Appeal by Special Leave from the Judgment and Order dated the 17th January, 1964, of the Andhra Pradesh High Court in Criminal Revision Case No. 215 of 1963.

P. Ram Reddy, Senior Advocate (*K. Jayaram*, Advocate, with him), for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

Vaidialingam, J.—In this appeal, by Special Leave, on behalf of the State of Andhra Pradesh, the appellant herein, Mr. P. Ram Reddy, learned Counsel, challenges the order dated 17th January, 1964, of the Andhra Pradesh High Court, setting aside the conviction of the respondents, for an offence under section 4 (1) (*a*), of the Andhra Pradesh (Andhra Area) Prohibition Act (X of 1937), hereinafter called the Act.

According to the prosecution, the respondents were found transporting, in a bullock cart, on the early morning of 10th June, 1962, fifty gallons of arrack. It is the case of the prosecution that the prohibition staff found, on the day in question, a bullock cart, driven by the first respondent, in which the fifty gallons of arrack were found in 13 tins. Accordingly they were prosecuted for an offence under section 4 (1)

*Cr. A. No. 6 of 1965. 2nd May, 1967.

(*a*), of the Act. All the respondents substantially denied, having committed the offence with which they were charged.

The prosecution let in the evidence of the Prohibition Sub-Inspector, P. W. 1, and another petty officer of the prohibition staff, P. W. 4. The evidence of these two witnesses, was to the effect that when the bullock cart, in question came near them, there was a smell of arrack. In particular, P. W. 4 has stated that the tins, which were in the bullock cart were pierced with bayonet, and when smelt, they gave a strong smell of arrack. To corroborate the evidence of these two officers, the other witnesses, P. Ws. 2 and 3, who were stated to have witnessed this occurrence, along with the prohibition party, were also examined. They stated that when the bullock cart came near them, they got a strong smell of arrack, and that the 12 tins were pierced with bayonet ends and their contents verified. Only some of the witnesses have been cross-examined, and the respondents, have suggested to them that during that hour of the night, it would not have been possible for them to identify the persons, who were stated to have been in the bullock cart. No doubt, no specific suggestion, that the commodity that was seized, is not one to which the Act applies, has been made. During the trial, however the question appears to have been raised, among other contentions, that the prosecution has not established the necessary ingredients for establishing that the respondents have committed the offence, under section 4 (1) (*a*), of the Act. The trial Court, adverting to this aspect, has referred to the evidence of P. Ws. 1 to 4, who speak to a strong smell of arrack, emanating from the cart, and the tins being pierced with bayonet ends. In view of this evidence, the trial Court is of the opinion that the ground for coming to the conclusion, that it was arrack that was being transported, is established. Ultimately, the trial Court accepted the evidence of the prosecution, found the respondents guilty of the offence under section 4 (1) (*a*) of the Act, and sentenced each of them to undergo rigorous imprisonment for six months.

The respondents challenged their conviction, before the learned Sessions Judge, Kurnool. Before the appellate Court also, the respondents pleaded that there is no proper proof, in this case, that the tins contained arrack. A mere statement. by the witnesses, that there was a strong smell of arrack, emanating from the tins when they were pierced with bayonet ends, is not sufficient to establish the guilt of the accused. They have also specifically raised the contention that samples of the commodity should have been sent for the opinion of the Chemical Examiner.. This plea, of the respondents, was again brushed aside, by the learned Sessions Judge, on the ground that the prohibition officer must be considered to have got sufficient experience of smelling and knowing whether a liquid was arrack, or not, and, inasmuch as he has deposed that the liquid was found to be arrack, by smell, that statement can be accepted as proof of the nature of the liquid that was being transported, by the respondents. The learned Sessions Judge has also stated that no further testing is called for: The learned Sessions Judge, in the end, confirmed the conviction of the respondents.

The respondents carried the matter further, to the High Court of Andhra Pradesh, in revision. The High Court has accepted the plea of the respondents that, in this case, there has been no proper proof that the commodity that was found to be transported, was arrack. The High Court is of the view that when the accused have denied the offence of carrying any arrack, the prosecution should have got the commodity examined, by a Chemical Examiner, and inasmuch as that procedure has not been adopted, the High Court ultimately, set aside the conviction of the respondents.

On behalf of the appellant-State, Mr. Ram Reddy, urged that, in this case, inasmuch as the prosecution has let in the evidence of the Prohibition Inspector and the petty officer, who must be considered to be well aware of arrack, the High Court was not justified in interfering with the decisions of the subordinate Courts. Counsel has also pointed out that the prosecution witnesses have spoken to the fact that the contents of the tins were examined, by being pierced with bayonet ends and it is, after such examination, the Prohibition Sub-Inspector satisfied himself that the tins contained arrack.

There is no appearance, on behalf of the respondents, before us, in this Court.

This will be a convenient stage to refer to the relevant provisions of the Act. Section 3 defines certain expressions. 'Intoxicating drug' is defined, under section 3 (3), and section 3 (9) defines "liquor" under which the commodity, in question is stated to fall. 'Liquor' includes toddy, spirits of wine, methylated spirits, spirits, wine, beer and all liquid consisting of or containing alcohol. Under section 4 (1) (*a*), whoever imports, exports, transports or possesses liquor or any intoxicating drug, shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both. In this case, according to the prosecution, the respondents had transported liquor. The expression 'liquor', as mentioned earlier, is defined under section 3 (9). The prosecution will therefore have to establish that the commodity in question comes under one or other of the various items referred to in the definition of 'liquor'. The question is whether the prosecution has so established, in this case.

In our opinion, in the circumstances of this case, the High Court was perfectly justified in holding that the prosecution has not established that the respondents are guilty of an offence, under section 4 (1) (*a*) of the Act. It is needless to state that, in this case, unless the prosecution proves the contravention of the provisions of the Act, in question, it cannot succeed in establishing the guilt of the accused. For that purpose, the prosecution will have to establish two things: (i) that the article seized from the accused is 'liquor', under section 3 (9) of the Act; and (ii) that the accused "transported" the same.

Except for a general statement, contained in the evidence of the witnesses, particularly P. Ws. 1 and 4, that there was a strong smell of alcohol, emanating from the tins, which were pierced open, there is no other satisfactory evidence to establish that the article is one coming within the definition of the expression 'liquor'. Merely trusting to the smelling sense of the Prohibition Officers, and basing a conviction, on an opinion expressed by those officers, under the circumstances, cannot justify the conviction of the respondents. In our opinion, better proof, by a technical person, who has considered the matter from a scientific point of view, is not only desirable, but even necessary, to establish that the article seized is one coming within the definition of 'liquor'.

Mr. Ram Reddy, learned Counsel for the State, no doubt pointed out that the accused have not challenged effectively the answers given by the prosecution witnesses that the commodity is arrack. In our opinion, the circumstance, pointed out by the learned Counsel, will not absolve the prosecution from establishing the ingredients of the offence, for justifying the conviction of the respondents. Even otherwise, it will have to be noted that all of them have, categorically, denied the offence and have also stated, in general terms, that no arrack was seized from them.

Before we close the discussion, it is necessary to refer to a recent decision of this Court in *Baidyanath Mishra* v. *The State of Orissa*[1]. In that case, the question was as to whether the appellants, therein, were in possession of opium, so as to make them liable for an offence. The Opium Act of 1878, defines the expression 'opium.' The appellants contended that the article seized from them was not opium, as defined in that Act, and pointed out that the only evidence, relied on by the prosecution, to establish that the article recovered from them was opium, was the evidence of the Prohibition staff, and that the article has not been subjected to any chemical analysis. This Court rejected that contention, in the particular circumstances of the case, and stated :

"It is true that opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. It is possible for people to identify opium without having to subject the product to a chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being

1. Cr. A. No. 270 of 1964 decided on 17th April, 1964.

apprehended by the senses that a chemical analysis may be necessary......Two other witnesses who were cultivators and who knew what they were talking about said that it was opium. If the appellants, who themselves were licensed vendors of opium, had the slightest doubt about the correctness of these statements they could have challenged them either by cross-examination or by suggesting to the Court that the substance be analysed to determine whether it was opium or not."

These observations will clearly show as to why this Court in that case has expressed the view that there is no infirmity in the prosecution case, simply because there has been no chemical analysis made, of the commodity, which, according to the prosecution, was opium. The facts in the instant case before us, are entirely different, and the observations, extracted above, do not apply.

In the result, the order of the High Court is confirmed and this appeal dismissed.

R.M. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, *Chief Justice*, M. HIDAYATULLAH, S.M. SIKRI, R.S. BACHAWAT AND J.M. SHELAT, JJ.

Sri Krishna Coconut Co., and others .. *Appellants**

v.

The East Godavari Coconut and Tobacco Market Committee .. *Respondent.*

Madras Commercial Crops Market Act (XX of 1933), *section* 11 (1) *and Rule* 28 *of the Rules made thereunder—Interpretation—Legality of the levy of " fee " on commercial crops " bought and sold " in the notified area—Nature of the transactions covered by the word "bought and sold"—Application to transactions of purchase as the concept of purchase which includes a corresponding sale—Power of High Court to decide the " real issue."*

On the questions (*i*) whether the goods in respect of which the fee under section 11 (1) of the Madras Commercial Crops Market Act, 1933, was levied were goods " bought and sold " within the notified area as envisaged by the section and (*ii*) whether the High Court was in error in permitting the respondent to shift its case and argue in a way different from way it did before the District Munsif and Subordinate Judge.

Held, The manifest intention of the Legislature in passing the Act in question being the prevention of the mischief of exploitation of producers of commercial crops such as coconuts and copra by middlemen and securing of a fair deal and a fair price to the producer, the words " bought and sold " used in section 11 (1), should be construed to mean in the way the Legislature intended it to be viewed *i.e.*, as one transaction resulting in buying on the one hand and selling on the other (by the producer). Sub-section (1) of section 11 makes the purchaser principally liable for payment of the fee and this supports the said construction.

Since neither the Trial Court nor the Subordinate Judge had gone into the real question at issue, namely, whether the levy made with respect to goods were goods bought and sold " within the notified area as envisaged by section 11 (1), the High Court in order to do justice to the parties approached the question from the correct angle and went into the real issue arising in the suits (*i.e.*,) whether the levy was rightly made on the transactions of purchase made by the appellants from those who sold the goods to them. Therefore there was no question of its having allowed the committee to change its case or to make out a new case.

Appeals by Special Leave from the Judgment and Order, dated 8th November, 1961, of the Andhra Pradesh High Court in Second Appeals Nos. 720 and 724 to 726 of 1957.

* C.As. Nos. 858 to 861 of 1964. 27th October, 1966.

C.B. Agarwala, Senior Advocate, (*T.V.R. Tatachari*, Advocate, with him), for Appellants (In all the Appeals).

P. Ram Reddy, Senior Advocate, (*K.R. Sharma*, Advocate, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shelat, J.—All these four appeals by Special Leave raise a common question regarding interpretation of section 11 (1) of the Madras Commercial Crops Market Act XX of 1933 and Rule 28 of the Rules made thereunder and therefore can be disposed of by a common judgment.

The Act was originally enacted by the Madras Legislature. It was a law in force immediately before the Constitution of the State of Andhra Pradesh and governed the territories now forming part of that State. By virtue of Andhra Pradesh Act of 1953 and the Adaptation of Laws Order passed on 1st November, 1953, by the State Government of Andhra Pradesh it became applicable to the newly formed State of Andhra Pradesh. By a Notification dated 27th June, 1949, the then Government of Madras, in exercise of the power conferred on it by section 2 (1) (*a*), declared coconuts and copra to be commercial crops. Under section 4 of the Act, the State Government also declared the District of East Godavari as the "notified area" for purposes of the Act in respect of coconuts and copra. By a further notification dated 5h December,1950, issued under section 4(*a*) of the Act it established a Market Committee at Rajahmundry for the said notified area. The said Market Committee levied the following fees, *viz.*, (1) a licence fee under section 5 (1) of the Act read with Rule 28 (3) ; (2) a licence fee for storage, wharfage etc., under section 5 (3) read with Rule 28 (3) ; (3) a registration fee under section 18 read with Rule 37 ; (4) a fee on the said goods bought and sold within the notified area and under section 11 (1) read with Rule 28 (1) and (5) a fee under the same section on consignments of coconut oil.

Contesting the levy of fees under items 2 to 5 as being illegal on the ground that they sold coconuts and copra to customers outside the notified area and in some cases outside the State, the appellants filed various suits in the Court of the District Munsif, Amalapuram for refund of the said fees collected by the said Committee at different times. The Market Committee resisted the said suits claiming that the aforesaid provisions conferred power upon it to levy the said fees and that the said levy was valid and legal. The said suits were tried together and the District Munsif by his judgment dated 17th October, 1955, *inter alia* held that the levy under section 11 (1) read with Rule 28 (1) though called a "fee" was really a "tax", that the said provisions empowered the Committee to impose the said tax only when the said goods were bought and sold within the notified area, that the sales effected by the appellants were to customers outside the said area and in some cases outside the the State, that the Committee had no power to levy and collect the said fees and therefore the appellants were entitled to refund of the said fees and accordingly passed decrees in all the suits. In appeals by the Committee, the Subordinate Judge, Amalapuram, held that though the appellants purchased the said goods within the notified area they exported them to their customers outside the notified area and outside the State and relying upon the decision in *Kutti Keya* v. *State of Madras*[1] he held that though section 11 (1) called the said levy as fee it was in substance a tax and that such a tax being on sales completed at the places of their customers outside the State offended Article 286 of the Constitution and was therefore illegal. The Subordinate Judge, except for deleting the relief granted in respect of licence fee under section 5 (3) of the Act, dismissed the appeals and confirmed the judgment and decree of the Trial Court. The Market Committee there upon filed Second Appeals in the High Court of Andhra Pradesh. Before the High Court the controvery centred round the question of fee under section 11 (1) only. By its common judgment dated 8th November,1961, the High Court relying upon the judgment of a

1. (1954) 1 M.L.J. 117: A.I.R. 1954 Mad. 621.

Division Bench of that Court in *Satyanarayana and Venkataraju Firm* v. *Godavari Market Committee*[1] held that the word " fee" in section 11 (1) was in fact a fee and not a tax. The Division Bench also held that the said goods were purchased by the appellants from producers or petty dealers within the notified area and then sold by them to customers outside the said area or the State, that the transactions which were the subject-matter of the levy under section 11 (1) were transactions consisting of purchase of the said goods by the appellants and the corresponding sales to them by the producers and petty dealers and not the subsequent sales effected by them to their customers outside the notified area or the State, that therefore the transactions on which the said fee was levied were effected and completed inside the notified area and fell within the expression " bought and sold " in section 11 (1) and therefore the Market Committee rightly levied the said fee on those transactions. In the result, the Division Bench allowed the appeals and dismissed the appellant's suits. It is this judgment and decree against which these appeals are directed.

The preamble of the Act states that the Act was passed for making provisions for better regulation of buying and selling of and the establishment of markets for commercial crops. As stated in *M.C.V.S. Arunachala Nadar* v. *The State of Madras*[2], the Act was the result of long exploratory investigation by experts in the field, conceived and enacted to regulate the buying and selling of commercial crops to provide suitable and regulated markets, to eliminate middlemen and bring face to face the producer and the buyer so that they meet on equal terms thereby eradicating or at any rate reducing the scope for exploitation of the producers. It therefore provided a machinery for regulating trade by providing a common place where facilities would be furnished by way of space, buildings and storage accommodation, and where market practices would be regularised and market charges clearly defined and unwarranted ones prohibited, where correct weighment would be ensured by licensed weighmen and all weights would be checked and stamped, where payment on hand would be ensured, where provision would be made for settlement of disputes, where daily prevailing prices would be made available to the grower and reliable market information provided regarding arrivals, stocks, prices etc., and where quality standards would be fixed when necessary and contract forms standardized for purchase and sale. The result of the implementation of the Act would be thus to give reasonable facilities to the growers of commercial crops ensuring proper price for their commodities.

Section 4 (*a*) (1) provides for the formation of a market committee for enforcing the provisions of the Act and the Rules and by-laws framed thereunder. Sub-section (2) lays dowr that the Committee shall establish in the notified area such number of markets providing such facilities, as the State Government may from time to time direct, for purchase and sale of commercial crops. Section 5 prohibits any person to set up, establish or use, continue or allow to be continued any place within the notified area for the purchase or sale of commercial crops except under a licence and in accordance with the conditions thereof. The Market Committee, however, can exempt from the provisions of this sub-section any person who carries on the business of purchasing or selling any commercial crop in quantities not exceeding those prescribed by the Rules. It also exempts from the provisions of this section a person selling a commercial crop which has been grown by him or a co-operative society selling a commercial crop which has been grown by any of its members and also a person purchasing for his private use a commercial crop in quantities not exceeding those prescribed by the rules. Section 6 provides that every market committee shall consist of such number of members not exceeding twelve as may be fixed by the State Government and provides for representatives of licencees under section 5 and buyers, sellers and buyers and sellers registered under the rules prescribed in that behalf. Section 11 (1) with which we are concerned in these appeals reads :

1. (1959) 1 An.W.R. 285 : I.L.R. (1959) A.P. 648 : A.I.R. 1959 Andh. Pra. 398.
2. (1959) 1 S.C.R. (Supp.) 92 : (1959) 1 M.L.J. (S.C.) 133 : (1959) 1 An.W.R. (S.C.) 133 : (1959) S.C.J. 297.

"The Market Committee shall, subject to such rules as may be made in this behalf, levy fees on the notified commercial crop or crops bought and sold in the notified area at such rates as it may determine."

The Explanation to sub-section (1) provides that all notified commercial crops leaving a notified area shall, unless the contrary is proved, be presumed to be brought and sold within such area. Sub-section 2 provides that the fee chargeable under sub-section (1) shall be paid by the purchaser of the commercial crop concerned provided that where such a purchaser cannot be identified the fee shall be paid by the seller. Section 12 provides that all monies received by a market committee shall be paid into a fund and all expenditure incurred by the market committee shall be defrayed out of the said fund. The expenditure which the committee can incur is for purposes set out in section 13 which incidentally reflect the object and purpose of the Act. Section 18 empowers the State Government to make rules including rules for licence fee under section 5, the registration fee and the prohibition of buying and selling of commercial crops in the notified area by perons not so registered and the fee to be levied on commercial crops bought and sold in the notified area. Rule 28 lays down the maximum fee leviable on commercial crops under section 11 (1) as also the maximum fee payable for licences and registration. Rule 28-A provides that the fees referred to in sub-rule (1), that is " fees " under section 11 (1), shall not be levied more than once on a commercial crop in a notified area. These provisions clearly show the policy of safeguarding the interests of the producers and of guaranteeing to them reasonable return for the crops they would bring to sell without being exploited.

Mr . Agarwala raised the following contentions : (1) that the fee charged by the Market Committee under section 11 (1) was on sales effected by the appellants with their customers, some of whom were admittedly outside the notified area and the rest outside the State : (2) that that was the footing on which the parties proceeded with the suits but that case was given up in the High Court and the High Court was in error in permitting the Committee to shift its case and argue that the fee was levied not on those sales but on transactions of purchase entered into by the appellants with the producers and other petty dealers.

It is true that in para 3 of their plaint the appellants averred that their business activities consisted of buying coconuts and copra in East Godavari District and selling them to customers outside the notified area and even the State and that those sales were completed at the respective places of those customers. The appellants' case therefore was that in respect of these sales with customers some of whom were outside the notified area and the rest outside the State, the levy of fee was in the former case beyond the ken of section 11 (1) and in the latter case repugnant to Article 286 of the Constitution. The written statement of the respondent-committee denied these allegations. The Committee asserted that both the purchases and sales took place in the notified area and that though the fee levied by it was on sales by the appellants and though delivery of the said goods thereunder took place outside the notified area the sales in respect thereof were made within the notified area and therefore the question of the levy under section 11 (1) being repugnant to Article 286 of the Constitution did not arise. Besides these pleadings Mr. Agarwala drew our attention to certain notices of demand and circulars issued by the Committee in which it was stated that the said fee was being levied on goods exported outside East Godavari District and that the traders were liable to pay it both on coconuts exported to outsiders and also consumed internally. That presumably was stated because if the goods were " brought and sold " within the notified area, even if they were subsequently exported outside, section 11 (1) would apply. The practice followed by the appellants and not denied by the Committee was that they used to despatch these goods by rail to their customers. Railway receipt and hundies were then sent to their bankers at the destination and railway receipts were delivered to the customers on their honouring the hundies. Thus the goods were delivered outside the notified area and the sales effected by the appellants to their customers were also completed at places outside the notified area and in some cases outside the State.

On these facts the District Munsif held that property in the goods having passed at destination, sales took place outside the notified area and therefore the fee charged by the Committee was illegal as section 11 (1) permitted such a levy only on goods bought and sold within the notified area. On appeal by the Committee, the Subordinate Judge held that the said fee was a tax, that it was a tax on sales outside the notified area and the State and was not therefore warranted under section 11 (1) and was repugnant to Article 286. It seems that in both the Courts the real issue was lost sight of *viz.*, whether the goods in respect of which the fee under section 11 (1) was levied were goods "bought and sold" within the notified area as envisaged by the section.

In the High Court however the questions canvassed were : (1) whether the fee provided in section 11 (1) was a fee or a tax and (2) even if it was a fee whether the Committee had the power to levy it in respect of goods sold by the appellants outside the notified area. As already stated the Trial Judge and the Subordinate Judge had proceeded on the footing that the said fee was levied on sales entered into by the appellants with their customers who undoubtedly were outside the notified area. But the real question that ought to have been dealt with by the Trial Judge and on appeal by the Subordinate Judge was not whether the appellants' sales were to customers outside the notified area or the State but whether the fee which was levied was valid. The question of the validity of the levy entailed another question, *viz.*, whether the levy was on transactions effected by the appellants before they sold those goods to their customers. Were the appellants entitled to a refund of the fees levied on them under section 11 (1) was the principal question in the suits. To decide that question it was necessary for the Court to go into the question whether the fee was charged on the sales by the appellants or on the transactions made between them and those from whom they purchased the goods in question. Since neither the Trial Court nor the Subordinate Judge had gone into that question, it was necessary for the High Court to go into it not only to do justice to the parties but also because that was the real issue arising in the suits and was the crux of the litigation. There was therefore no question of the High Court allowing the respondent-committee to make out a new case. The question from the very inception was whether the Committee was competent to levy the fee in question under section 11 (1). To answer that question the Court necessarily had to enquire on which transactions could be the said fee be levied under section 11 (1) and whether it was rightly levied by the Committee. The High Court answered these questions by holding that it was levied on the transactions effected by the appellants with those from whom they bought the said goods, that section 11 (1) dealt with those transactions and was not therefore concerned with the subsequent sales entered into by the appellants with their customers outside the notified area. Since, according to the High Court, those transactions were admittedly effected within the notified area the levy was valid and warranted under section 11 (1). In our view the High Court approached the question from a correct angle and therefore there was no question of its having allowed the Committee to change its case or to make out a new case.

That being the position, the next question is whether the Committee could levy fee under section 11 (1) on the transactions effected by the appellants before they sold those goods to their customers. Mr. Agarwala's contention was that the fee levied under section 11 (1) could only be in respect of goods "bought and sold" and not in respect of transactions where goods were only "bought" or only "sold". According to him it is only when a person bought goods and sold those identical goods within the notified area that the fee under section 11 (1) could be levied. According to him, the transactions effected by the appellants consisted in their purchasing the said goods they stopped at the stage of goods "bought". Therefore, the other ingredient for a valid levy of the fee not being present the fee levied in the present case was not in accordance with the requirements of section 11 (1) and was unwarranted. This contention raises the question as to the meaning of the words "bought and sold" in section 11 (1). At first sight they would appear to be susceptible of three meanings *viz.*, (1) that they mean duality of transactions where the same person buys goods and sells these identical goods in the notified area ; (2)

that they mean " bought " or " sold ". the conjunctive " and " meaning in the context of the sub-section the disjunctive " or " and (3) that they apply to a transaction of purchase as the concept of purchase includes a corresponding sale. When a person buys an article from another person, that other person at the same time sells him that article and it is in that sense that section 11 (1) uses the words " bought and sold." The incidence of the fee under section 11 (1) is on the goods thus " bought and sold." This last interpretation was favoured by the High Court of Madras in *Louis Dreyfus & Co.* v. *South Arcot Groundnut Market Committee*[1], which has been accepted by the High Court in the present case.

If the construction commended to us for acceptance by Mr. Agarwala were to be correct, *viz.*, that the appellants' transactions stopped at the stage of goods " bought ", they would not be transactions in respect of goods " bought and sold." If the fee was levied on sales effected by the appellants with their customers its levy would not be valid under section 11 (1) and would also be repugnant to Article 286 where goods were delivered outside the State. But it is a well settled rule of construction that the Court should endeavour as far as possible to construe a statute in such a manner that the construction results in validity rather than its invalidity and gives effect to the manifest intention of the legislature enacting that statute. The object in passing the Act was to prevent the mischief of exploitation of producers of commercial crops such as coconuts and copra and to see that such producers got a a fair price for their goods. The mischief to prevent which the Act was enacted was the exploitation of these producers by middlemen and those buying goods from them and therefore the Act provided facilities such as a market place, place for storage, correct weighment, etc., so that the producers and his purchasers come face to face in a regulated and controlled market and a fair price was obtained by them. If the construction suggested by Mr. Agarwala were to be accepted and the section were to be construed as being applicable to those transactions only which have a dual aspect, that is,.. buying by a dealer from a producer and the dealer selling those identical goods within the notified area, the object of the Act would be defeated, for in a large number of cases the transactions would halt at the stage of buying and the Committee in those cases would have no power to levy the fee on them. Why is a buyer or a seller or a buyer and seller required to be registered and why does the Act prevent those who have not registered themselves from effecting transactions in commercial crops unless the object was to regulate and control transactions in those commodities at all stages and in a manner preventing the exploitation of the producer. The legislature had thus principally the producer in mind who should have a proper market where he can bring his goods for sale and where he can secure a fair deal and a fair price. The Act thus aims at transactions which such a producer would enter into with those who buy from him. The words ". bought and sold" used in section 11 (1) aim at those transactions whereunder a dealer buys from a producer who brings to the market his goods for sale. The transactions aimed at must be viewed in the sense in which the legislature intended it to be viewed, that is, as one transaction resulting in buying on the one hand and selling on the other. Such a construction is commendable because it is not only in consonance with the words used in section 11 (1) but is consistent with the object of the Act as expressed through its various provisions. The construction on the other hand canvassed by the appellants is defeative of the purpose of the Act and should, unless we are compelled to accept it, be avoided. The construction which we are inclined to accept acquires some support from the fact that section 11 (1) makes the purchaser and not the seller primarily responsible for payment of the fee and it is only when the purchaser cannot be identified that the seller is made liable.

Mr. Agarwala at first also urged that the fee under section 11 (1) amounted to a tax and that it was in fact a sales tax. But at the last moment he stated that he did not wish to press that contention and requested us not to express any opinion thereon. Since the contention is not pressed we need not express any opinion on

1. (1945) 1 M.L.J. 414 ; I.L.R. (1946) Mad. 127 ; A.I.R. 1945 Mad. 383.

that question and confine ourselves to the question as to the interpretation of the words " bought and sold " in that section.

In our view the construction placed by the High Court on section 11 (1) was a correct construction and therefore the respondent-committee had rightly charged the appellants with the said fee.

The appeals therefore fail and are dismissed with costs, one hearing fee.

V.M.K. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, V. BHARGAVA AND G. K. MITTER, JJ.

Solasa Ramachandra Rao and others .. *Appellants**

v.

Maddi Kutumba Rao and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Scope of—Deposit under—When can be dispensed with—Executory contract to satisfy the decree—If amounts to satisfaction of decree or an adjustment under Order* 21, *rule* 2.

There can be no doubt that if at the time when an application under Order 21, rule 89, Civil Procedure Code, is made by the judgment-debtor, the decree has been satisfied or adjusted, the deposit of any money for payment to the decree-holder is not called for. But where the decree-holder has only agreed to stay his hands in case satisfactory provision is made for payment of his dues, there is no adjustment of the decree, which could be recorded under order 21, rule 2, and the decree is kept alive, it cannot be said that the judgment-debtor is absolved from the obligation to deposit the amount under Order 21, rule 89 (*b*).

Quaere : Can an executory agreement between the decree-holder and the judgment-debtor such as a mere promise on the part of the judgment-debtor to take steps to ensure payment of the decretal debt, if acceded to by the decree-holder have the effect of satisfying or adjusting the decree ?

(A decree for payment of money is not a contract between the parties although it is possible for the parties to agree upon a course of payment or agree to have such a decree satisfied otherwise than by payment of money).

Appeal from the Judgment and Order dated the 4th March, 1963 of the Andhra Pradesh High Court in Appeal Against Order No. 4 of 1960.

A. K. Sen, Senior Advocate (*T. Satyanarayana*, Advocate, with him), for Appellants.

Bishan Narain, Senior Advocate (*Miss. A. Veda Valli* and *A. V. Rangam*, Advocates, with him), for Respondent No. 1.

R. Thiagarajan, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Mitter, J.—This is an appeal by a certificate granted by the High Court of Andhra Pradesh against a judgment and order of that Court dated 4th March, 1963. The appeal is by a receiver appointed in a suit under the provisions of section 92 of the Code of Civil Procedure with the object of applying for setting aside a sale of certain properties belonging to a choultry.

The facts shortly are as follows :—The second respondent before this Court obtained a decree in O. S. No. 116 of 1949 of Sub-Court, Vijayawada against

* C.A. No. 805 of 1964. 19th April, 1967.

Tammana Tatayya and Narayana Murty Annapurna Satram and put some property to execution sale. The properties of the satram were sold in Court auction on 1st July, 1957 and the first respondent, Maddi Kutumba Rao became the purchaser for Rs. 24,600. O. S. No. 60 of 1957 was instituted in the same Court for the removal of the two trustees on the ground of mismanagement. The decree-holder was made a party to this suit filed under section 92, Civil Procedure Code and one of the reliefs prayed for in the suit was that the sale above-mentioned be set aside and provision be made for payment of the decree amount in O. S. No. 116 of 1949 under the scheme to be settled by the Court. To quote from paragraph 11 of the plaint in that suit, the plaintiff asked that :

> "All proceedings in execution of the decree obtained by the 3rd defendant against the satram be stayed pending the framing of the scheme and that the sale in favour of the 4th defendant held on 1st July, 1957 by the Sub-Court, Gudivada in E.P. No. 37 of 1956 in O.S. No. 116 of 1949 Sub-Court, Vijayawada, be set aside and that adequate provision for the discharge of the same be made."

The plaint bears the date 22nd July, 1957. The decree-holder, the third defendant, was a minor represented by his mother and guardian, Lakshmikantamma. It appears that on 30th July, 1957 a memorandum was filed on his behalf in the Court of the Subordinate Judge. It was stated therein that :

> "As the plaintiff in O.S. No. 60 of 1957 have filed that suit for framing a scheme for the management of the choultry, etc. and have asked in that suit for a proper provision to be made for the amount due to the third respondent in this petition, under the decree in O.S. No. 116 of 1949, this third respondent agrees to the same.
>
> Therefore, this 3rd respondent has no objection, for allowing the petition that has been filed for setting aside the sale held on 1st July, 1957 in this suit without the necessity of depositing the sale warrant amount."

The receiver appointed in O. S. No. 60 of 1957 filed an application under Order 21, rule 89 in the Court of the Subordinate Judge to set aside the Court sale. He deposited Rs. 1,230 representing 5 per cent. of the purchase money for payment to the purchaser Rs. 410-15-0 as poundage and Rs. 123 for interest. No deposit was made for payment to the decree-holder and it was stated in paragraph 6 of the petition that :

> "The 3rd respondent represented by his mother is impleaded as third respondent in the Scheme Suit O.S. No. 60 of 1957, Sub-Court, Vijayawada, wherein necessary provision for the discharge of the decree debt due to him from the choultry is prayed for and has to be made. At the request of the petitioner to keep up the fair name and prestige of the founders of the choultry, the 3rd respondent's mother as guardian and executor agreed to the said course and is willing for an adequate provision for the discharge of the decree debt being made in the said suit and has agreed to postpone realising the decree debt in O.S. No. 116 of 1949, Sub-Court, Vijayawada, till then in case the existing trustees, respondents 1 and 2 do not choose to discharge the same in the meanwhile. Under the circumstances, the petitioner submits that the Hon'ble Court may be pleased to dispense with the deposit of the amount specified in the proclamation of sale for payment to the decree-holder as required by clause (*b*) of rule 89 of Order 21, Civil Procedure Code."

The prayer in the petition was that the sale of the properties in favour of the fourth respondent be set aside and that respondents 1 and 2 do pay the expenses to be incurred by the petitioner. The Subordinate Judge allowed the application observing :

> "Where there is an arrangement between the decree-holder and the judgment debtor for the satisfaction of the decree and the decree-holder does not want any deposit to be made into Court, it is perfectly open to the judgment-debtor to come forward with a petition under Order 21, rule 89 without depositing the amount required to be deposited under clause (*b*)."

This was upset in appeal by the High Court. According to the High Court, Order 21, rule 89 permits the decree-holder and the judgment-debtor to mutually cancel the decree debt and the cancellation of the debt may be either by an adjustment on a constructive payment or by waiver by the decree-holder. The High Court however found itself unable to agree with the conclusion of the Subordinate Judge that on the facts of the case the decree-holder could be said to have received the amount shown in the proclamation of sale for the purpose of Order 21, rule 89.

There can be no doubt that if at the time when an application under Order 21, rule 89 is made by the judgment-debtor, the decree has been satisfied or adjusted, the deposit of any money for payment to the decree-holder is not called for. It was argued on behalf of the appellants that a mere promise on the part of the judgment-debtor to take steps to ensure payment of the decretal debt if acceded to by the decree-holder would have the same effect. Reliance was placed on a judgment of this Court in *The Union of India v. Kishorilal Gupta and Brothers*[1]. There it was pointed out that ;

> " One of the modes by which a contract can be discharged is by the same process which created it, *i.e.*, by mutual agreement; the parties to the original contract may enter into a new contract in substitution of the old one."

Reference was also made to the rule as stated by Cheshire and Fifoot in their Law of Contract, 3rd edition at page 453 :

> "If what the creditor has accepted in satisfaction is merely his debtor's promise to give consideration, and not the performance of that promise, the original cause of action is discharged from the date when the agreement is made."

Relying on the above decision, it was contended on behalf of the appellants that even an executory agreement between the decree-holder and the judgment-debtor would have the same effect as the adjustment of a decree. It is necessary to bear in mind that a decree for payment of money is not a contract between the parties although it is possible for the parties to agree upon a course of payment or agree to have the decree satisfied otherwise than by payment of money. For the purpose of this appeal, it is not necessary to go into that question. Assuming that the proposition put forward on behalf of the appellants is correct, it must be shown that there was an agreement between the parties by which the decree-holder agreed to forego his rights under the decree. Paragraph 6 of the petition under Order 21, rule 89 which has been quoted above shows that the decree-holder had merely agreed to postpone realising the decretal amount in case respondents 1 and 2 did not choose to discharge the same. That petition shows clearly that it was anticipated that the Court would be in a position to make a provision for the discharge of the decretal debt. The decree was kept alive and not touched upon in any manner much less extinguished. The decree-holder was prepared to stay his hands in case satisfactory provision for payment of his dues was made in the suit. There was no adjustment of the decree which could be recorded under the provisions of Order 21, rule 2 ; neither had the decree been satisfied. The High Court was therefore right in its conclusion that the situation was not one which obviated the necessity for the judgment-debtor making a deposit under the provisions of Order 21, rule 89 (*b*). On behalf of the appellants, reference was also made to the fact that the auction purchaser had been permitted by the Court to withdraw the sum of Rs. 24,600 deposited in Court. We are informed that such withdrawal had been permitted but the auction purchaser had once more made the necessary deposit under the orders of the Court. This cannot affect the position in law under Order 21, rule 89.

In the result, the appeal fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

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1. (1960) S.C.J. 1101 : (1961) S.C.R. 493 at 502.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, V. BHARGAVA AND G. K. MITTER, JJ.

Rentala Lachaiah and others .. *Appellants**

v.

Chimmapudi Subrahmanyam .. *Respondent.*

Hyderabad Tenancy and Agricultural Lands Act (*XXI of* 1950), *sections* 2 (*v*), 5 *and* 32 (1)—*Interpretation—Tenants inducted on land by a trespasser—Tenants, if continued to have a right to be on the land against the will of the true owner.*

Hyderabad Land Revenue Act of 1317-*F*—*Section* 2 (13)—*Tenant inducted on land by a trespasser—If an* " asami shikmi " *i.e., a lessee holding under a document of lease or under an oral agreement.*

Under section 32 (1) of the Hyderabad Tenancy and Agricultural Lands Act, 1950, " a tenant or an agricultural labourer or artisan is entitled to possession of any land or dwelling house under any of the provisions of this Act may apply to the Tahsildar in writing in the prescribed form for such possession." " Tenant" has been defined in section 2 (*v*) of the Act as meaning an asami skikmi who holds lands on lease and includes a person who is deemed to be a tenant under the provisions of the Act. The relevant portion of section 5 of the Act *inter alia* provides that " a person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the landholder and if such person is not—(*a*) a member of the landholder's family, or (*b*) a servant on wages payable in cash or kind, but not in crop share or a hired labourer cultivating the land under the personal supervision of the landholder or any member of the landholder's family, or (*c*) a mortgagee in possession......"

If the person who inducted the tenants on the land, was found to be a trespasser on the date of such induction, did the tenants continue to have a right to be on the land against the will of the true owner ?

Held: The tenants who were inducted on the land by a person who was a trespasser on the date of such induction, are not entitled to the benefit of section 5 of the Act. The Legislature cannot be said to have intended and given protection to the actual tillers of the soil even if the person who put them in possession was found not to have any title to the land. If upheld otherwise, it would amount to encouraging trespass on the land by persons who had no shadow of title and creating rights in favour of others although they themselves had no title to the land.

The tenant inducted by the trespasser also cannot claim to be an "asami shikmi" under section 2 (13) of the Hyderabad Land Revenue Act of 1317-F., because under this section a person who claims to be an " asami skikmi " had to be a lessee either holding under a document of lease or under an oral agreement.

Appeal by Special Leave from the Judgment and Order dated the 10th September, 1962 of the Andhra Pradesh High Court in C. R. P. No. 1128 of 1959.

A. V. Rangam, Advocate, for Appellant.

P. Ram Reddy and *Triyambak Rao Deshmukh*, Senior Advocates, (*R. Vasudev Pillai*, Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

Mitter, J.—This is an appeal by Special Leave, from a judgment in a batch of civil revision petitions decided by the Andhra Pradesh High Court in September, 1962.

The facts necessary for the disposal of this appeal are as follows: One Ramalingayya died in the year 1941 possessed of considerable properties including

* C.A. No. 611 of 1964. • 19th April, 1967.

the lands which formed the subject-matter of the above mentioned civil revision petitions. Before his death, he had adopted the petitioner before the High Court one Chimmapudi Subrahmanyam, the respondent before this Court. He came into possession of the properties of his adoptive father after the latter's death. Ramalingayya's widow, however, raised a dispute about the factum and validity of the adoption and claimed the properties as the heir of her husband. Subrahmanyam filed a suit in the Court of the District Munsif, Khammam for a declaration that he was the adopted son of Ramalingayya. Pending the disposal of the suit, however, Ramalingayya's widow, who was the 4th respondent in C. R. P. No. 36 of 1952 before the High Court, claimed to have her name registered in the register maintained under the Hyderabad Land Revenue Act of 1317 F. by virtue of the provisions of section 59 of that Act. The land revenue authorities registered the widow Kaveramma as pattedar and dispossessed the adopted son of all the lands putting Kaveramma in possession thereof. The adopted son amended his plaint by including a prayer for possession. During the pendency of the suit, the widow Kaveramma was prohibited by an order of injunction from dealing with the lands in any way. This was sometime in the year 1944. The suit of the adopted son was decreed by the trial Court on 24th March, 1951 both with regard to the declaration of the right of adoption and succession as also possession over the lands mentioned in the schedule to the plaint. Thereafter, sometime in the year 1952 (the exact (date) does not appear from the records before us) Kaveramma leased the lands which were the subject-matter of the civil revision petitions to the appellants before this Court. This is borne out by the judgment of the District Collector, Khammam, dated 19th March, 1959 and the petition for Special Leave to this Court dated 18th October, 1962. Kaveramma preferred an appeal from the decree passed against her and this was dismissed by the High Court in 1954. The adopted son put the decree in execution and got delivery of possession through the Court in August, 1954. It appears that very soon thereafter, in September, 1954 the appellants surrendered possession of the lands to him and executed a deed in respect thereof. Notwithstanding that, about a year afterwards, they filed a petition on 7th October, 1955 for possession of the lands alleging that they had been in possession for " the last six years in the capacity of tenants." Their allegation further was that the adopted son and his mother had dispossessed them from the suit lands and they therefore prayed for being put back into possession. This claim was preferred under section 32 (1) of the Hyderabad Tenancy and Agricultural Lands Act, 1950. The Tahsildar made an order in favour of the appellants in July, 1958 which was upheld in appeal to the Collector in March, 1959. This led to the revision applications before the Andhra Pradesh High Court. The High Court allowed the Civil Revision Petitions and this has led to the appeal.

Under section 32 (1) of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as the ' Act')

> " a tenant or an agricultural labourer or artisan is entitled to possession of any land or dwelling house under any of the provisions of this Act may apply to the Tahsildar in writing in the prescribed form for such possession."

" Tenant" has been defined in section 2 (v) of the Act as meaning an " asami shikmi" who holds lands on lease and includes a person who is deemed to be a tenant under the provisions of the Act. The relevant portion of section 5 of the Act provides as follows :—

> " A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the land-holder if such person is not—
>
> (*a*) a member of the landholder's family, or
>
> (*b*) a servant on wages payable in cash or kind, but not in crop share or a hired labourer cultivating the land under the personal supervision of the landholder or any member of the landholder's family, or
>
> (*c*) a mortgagee in possession :
>
> * * * * *

* * * * *"

The appellants before this Court never were the tenants of Ramalingayya. They were inducted on the land by his widow after the decree of the suit for declaration of title and possession in favour of the adopted son. After the passing of the decree, the possession of the widow could only be that of a trespasser and it was not open to her to create any right in the land in favour of anybody. It was argued however both before the High Court and before this Court that the appellants were entitled to the benefit of section 5 as they were lawfully cultivating the land and should therefore be deemed to be tenants of such land. It was contended that the word " lawfully" was to be taken in conjunction with the words " cultivating" and the legislature intended to protect the actual tillers of the soil even if the person who put them in possession was found not to have any title to the land. This would indeed be a very strange provision of the law and would, if upheld, amount to encouraging trespass on the land by persons who had no shadow of title and creating rights in favour of others although they themselves had no title to the land. The meaning of the word ' asami shikmi " in the definition of the tenant in section 2 (v) does not appear from any provision of the Act but our attention was drawn to the Hyderabad Land Revenue Act, section 2 (13), according to which

" ' assami shikmi' means a lessee, whether holding under an instrument or under an oral agreement, and includes a mortgage of an 'asami shikmi's' rights with possession, but does not include a lessee holding directly under Government."

In our opinion, this does not help the appellants for the definition shows that a person who claims to be an "asami shikmi" had to be a lessee either holding under a document of lease or under an oral agreement.

The position might have been different if the appellants had been inducted on the lands by the widow after her recognition as a pattadar by the revenue authorities and before the disposal of the suit against her ; but, we are not concerned with that situation. The High Court had considered at some length the question whether she could create any tenancy rights when there was an injunction restraining her from alienating any property. We do not think it was necessary to go into that question for normally the order of injunction which was passed as an interlocutory measure would not survive the decree of the trial Court. Learned Counsel for the appellants cited the judgment of this Court in *Dahya Lal* v. *Rasul Mohammed Abdul Hakim*[1] and it was argued that the object of the Hyderabad Act of 1950 was to afford similar protection as was given to the tenants inducted by mortgagees under the Bombay Tenancy and Agricultural Land Act, 1948. Under section 2 (18) of the Bombay Act of 1948 as the same stood at the material time, a tenant was defined as " an agriculturist who holds lands on lease and includes a person who is deemed to be tenant under the provisions of the Act." Section 14 of the Act provided that " notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be determined unless the conditions specified in that section were fulfilled." In that case, it was common ground that the tenancy of the respondent was not sought to be determined on any of the grounds in section 14 but it was in execution of an award made by the Debt Relief Court that the respondent was dispossessed. The relevant portion of section 4 of that Act provided :

" A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not

(*a*) a member of the owner's family or

(*b*) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner's family, or

1. (1963) 2 S.C.J 450: (1963) 3 S.C.R. 1.

(c) a mortgagee in possession."

It was found in that case that the respondent was cultivating the land which belonged to another person, that he was lawfully cultivating the land because he derived his right to cultivate it from the mortgagee of the land and did not fall within the excepted categories. In these circumstances, it was held by this Court that he was a "deemed tenant" within the meaning of section 4 of the Act. This Court observed in that case :

"A mortgagee in possession is excluded from the class of deemed tenants on ground of public policy ; to confer that status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. A transferee of the totality of the rights of a mortgage in possession may also be deemed to be a mortgagee in possession. But a tenant of the mortgagee in possession is inducted on the land in the ordinary course of management under authority derived from the mortgagor and so long as the mortgage subsists, even under the ordinary law he is not liable to be evicted by the mortgagor."

According to this Court

"..........The Legislature by restricting the exclusion to mortgagees in possession from the class of deemed tenants intended that the tenant lawfully inducted by the mortgagee shall on redemption of the mortgage be deemed to be tenant of the mortgagor."

In *Dahya Lal's case*[1] the *ratio decidendi* was that the mortgagee in possession had the right to induct tenants on the land : normally, the right of such tenants would come to an end with the extinction of the rights of the mortgagee but the object of the Act was to give protection to tenants who had been lawfully inducted thereon; *inter alia* by the mortgagee and this class of tenants could be said to be lawfully cultivating the land. Such is not the position in the case before us. Kaveramma did not induct the tenants on the land in the normal course of management of the property. She put them in possession when she had lost her right to be there and consequently the decision of this Court in *Dahya Lal's case*[1] can be of no assistance to the appellants before us.

The appellants however sought to rely on two decisions of the Calcutta High Court which turned on the interpretation of same provisions of the Bengal Tenancy Act. In *Mohima Chunder Shaha* v. *Hazari Pramanik*[2], the plaintiff, appellant before the High Court sued to eject the defendants and recover possession of the land pertaining to the estate of Char Vantai, of which they stated that they and their predecessors had been for many years in possession as proprietors. It was alleged by them that the land sued for was diluviated by the river in 1294F. and subsequently re-formed on the old site when they re-took possession of it; that Government and other zamindars of a neighbouring mouza had dispossessed them in 1284F. and the plaintiffs had, in a suit brought against those zamindars obtained a decree declaring their rights and got possession of the land. They had repeatedly asked the defendants to quit the land but the latter failed to do so. The Munsif found that the defendants had not acquired a right of occupancy, and were liable to be ejected. In appeal to the District Judge it was held that although the defendants had not proved their acquisition of a right of occupancy, they were non-occupancy ryots and not mere trespassers and as such they were not liable to be ejected except under section 44 of the Bengal Tenancy Act on grounds which did not exist in the case. Before the High Court it was contended that the defendants were not non-occupancy ryots and as such could be ejected as trespassers. The High Court held that the defendants were cultivating ryots who were placed on the property by the Collector and that they had held possession for many years but not fort a period sufficient to create a right of occupancy. Accordingly they were within the class termed in the Bengal Tenancy Act as non-occupancy ryots. Under section 5 (2) of the Bengal Tenancy

1. (1963) 2 S.C.J. 450: (1963) 3 S.C.R. 1. 2. I.L.R. (1890) 17 Cal. 45.

Act a ryot means primarily "a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right." Section 4 of the Act specified non-occupancy ryots as one of the classes of tenants under that Act. Under section 3 (3) of the Act, a tenant means "a person who holds land under another person, and is, or but for a special contract would be liable to pay rent for that land to that person." The High Court held that the defendants were clearly liable to pay for use and occupation of the land and in the light of the definition of "rent" in section 3 (5) it had to be held that the defendants were ryots and therefore non-occupancy ryots within the terms of the Bengal Tenancy Act. The High Court finally observed:

> "It may seem anomalous that the defendants, who have no title from the plaintiffs directly, or through their predecessors in estate, should thus be protected as non-occupancy ryots from ejectment as trespassers at the plaintiffs free will; but it seems to us that this is in accordance with the general spirit of the Bengal Tenancy Act, which regards a landlord as a rent-receiver and as able to eject a tenant or cultivator of the soil, not an under-tenant, only for certain specified reasons and conditions, none of which here exist. If the defendants had acquired a right of occupancy by occupation for twelve years, they would have been protected from ejectment, and as non-occupancy ryots they are also protected, except as specially provided."

It will therefore be noticed that the scheme of the Bengal Tenancy Act was entirely different from the provisions of the Act we have to construe. There occupancy ryots were protected altogether from ejectment but so long as they were non-occupancy ryots they were also protected except under conditions mentioned in section 44. Here too the Act would have protected them if their original induction was lawful so that they could be said to be lawfully cultivating the lands.

The other decision of the Calcutta High Court is that in *Binad Lal Pakrashi* v. *Kalu Pramanik*[1]. In this case the plaintiffs who were proprietors sought to oust the defendants from certain lands which they were cultivating in Barakahali village. Previously thereto, there was a dispute regarding these lands between the plaintiff and the trustee of the late D. N. Tagore who claimed them as the re-formed lands of village Modhupur. The plaintiffs were dispossessed of the lands in consequence of the order of a Magistrate who in a proceeding under section 145, Criminal Procedure Code, declared possession to be with the trustees. The lower Courts found that the defendants were settled on the land by the trustees but they had not acquired a right of occupancy at the time the suits were brought against them by the plaintiffs in January, 1889. Meanwhile in 1878 the plaintiffs had sued the trustees and obtained decrees which were confirmed in appeal by the High Court. In January, 1886 the plaintiffs took possession of the lands as against the trustees and then they brought suits to eject the defendants as trespassers. They had not received rent from the defendants or in any way admitted their tenancy. The trial Court decreed the suits in favour of the plaintiffs but these were upset in appeal by the District Court on the authority of *Mohindra Chunder Saha's case*[2]. According to the Full Bench:

> "The possession of the land in question for the purpose of cultivating it was acquired a good many years ago by the defendants from the persons who at that time were in actual possession of the zamindari within which it was situated, and who were then the only persons who could give possession of the lands of the zamindari to cultivators."

The Full Bench held that although they had established their right to the zamindar the plaintiffs could not treat the cultivators as trespassers and obtain *khas* possession of the lands from them. Referring to section 5 (2) of the Bengal Tenancy Act, the learned Chief Justice said:

1. (1893) I.L.R. 20 Cal. 708.
2. I.L.R. (1890) 17 Cal. 45.

"The possession and interest in the land which the defendants acquired from the persons in possession of the zamindari was a right to hold it for the purpose of cultivating it as against all the world except the true owners of the zamindari, and against them unless they proved a title to the zamindari paramount to that of the plaintiff's landlords.

This was, I think, a right to hold the land for the purpose of cultivating it within the meaning of section 5, clause 2..........................the defendants are ryots, and the only right of the person who has obtained possession of the zamindari is to the rent payable for the land, and not to the *khas* possession of the land itself, unless they can do so under the provisions of the Tenancy Act."

The facts in the Calcutta cases were different from the case before us and the Bengal Tenancy Act gave protection to persons cultivating the land in circumstances which do not obtain here. It would therefore not be right to hold, on the basis of the decisions in the Calcutta High Court, that although the person who inducted the tenants on the land was found to be a trespasser on the date of such induction, the tenants continued to have a right to be on the land against the will of the true owner.

The appeal, therefore fails and is dismissed, but, on the facts of this case, we do not make any order as to costs.

V.M.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—M. HIDAYATULLAH AND C. A. VAIDIALINGAM, JJ.

The State of Maharashtra .. *Petitioner**

v.

Dr. M. N. Kaul (dead) by his legal representatives and another .. *Respondents.*

Contract of guarantee—Construction of—Guarantor prescribing time-limit for enforcement—Guarantee unenforceable after the expiry of the period prescribed.

Under the law the guarantor cannot be made liable for more than he has undertaken. In case of ambiguity when all other rules of construction fail the Courts interpret the guarantee *contra proferentem*, that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement.

After construing the letter of guarantee (in which time-limit was prescribed for the enforcement of the guarantee), it was held, that it is impossible to ignore the time-limit which is an integral part of the guarantee and as no attempt was made to enforce it within the prescribed time, it was no longer enforceable thereafter.

Application on behalf of the Petitioner herein for directions regarding withdrawal of guaranteed sum of money.

R. H. Dhebar, Advocate for *S. P. Nayyar*, Advocate, for Petitioner.

Sardar Bahadur, Advocate, for Respondent 1.

Rameshwar Nath and *Mahinder Narain*, Advocates of *M/s. Rajinder Narain & Co.*, for Respondent 2 (National & Grindlays Bank Ltd.)

The Order of the Court was made by

Hidayatullah, J.—By an order dated 12th February, 1962 this Court granted conditional stay of the operation of an Assessment Order passed by the Sales-tax Officer (XII) Enforcement Branch, Greater Bombay and of the notice of demand

* C. M. P. No. 331 of 1966 (W. P. No. 9 of 1962). 28th March, 1967.

issued by him against Dr. M. N. Kaul (deceased). The notice of demand required Dr. Kaul to pay Rs. 18,240-06 and stay was granted on condition that Dr. Kaul must furnish bank guarantee for the amount in favour of the Registrar of this Court. Dr. Kaul furnished guarantee of the National & Grindlays, Bank Ltd, and it was accepted by this Court and the Sales-tax Officer. We shall presently refer to the terms of this guarantee which was executed by the Bank on 23rd March, 1962. Dr. Kaul died and the writ petition was placed before this Court on 15th March, 1965. On that date the minutes record:

"The Court made no order as the writ petition has abated due to the death of the petitioner."

On 25th November, 1965 the State of Maharashtra moved Civil Miscellaneous Petition No. 331 of 1966. It was stated that the order of stay had come to an end and the amount of Rs. 18,240-06 which had by addition of interest become Rs. 19,581-50 became payable. The State, therefore, sought to recover the amount from the guarantor. As there was a deficit of a sum of Rs. 1,341-44 the State asked to be paid that amount from the security for costs of Rs. 2,500 deposited by Dr. Kaul in this Court. The matter was heard on a notice of motion taken out on 7th February, 1966. On 3rd February, 1966, the Bank addressed a letter to the Registrar to the following effect :—

"The Deputy Registrar,

Supreme Court of India,

New Delhi.

Dear Sir,

Re : Our L/G No. 100/37 dated 23rd March, 1962, issued on account of Dr. M. N. Kaul for Rs. 18;240.06 P. in the matter of Kaul *v.* State of Maharashtra and another.

Our customer Dr. M. N. Kaul has expired and this guarantee is lying outstanding in our books.

To enable us to take this guarantee out of our books please send it to us for cancellation urgently.

Yours faithfully,
(Sd.) Illegible,
P. Manager
(D.R. OSHIDAR)."

On 23rd February, 1966, the Bank filed a counter-affidavit, raising several objections The first objection was that the application was incompetent in the absence of the legal representatives of Dr. Kaul. The second was that the guarantee had become unenforceable as the time limit for its enforcement had expired. Lastly, the Bank declined liability in excess of the amount of the guarantee. A further affidavit was filed by the Bank stating that on or about 11th March, 1966, the Bank received a notice purporting to be under section 17 of the Bombay Sales Tax Act from the Office of the Sales Tax Officer asking the Bank to pay the sum of Rs. 18,240-06 P., without prejudice to the application for directions pending in this Court. The Bank further stated that an amount of Rs. 18,411-97 P. was standing to the credit of the late Dr. M. N. Kaul with the Bank. The Bank offered to remit the amount in answer to the notice under section 17 of the Sales Tax Act provided the Bank Guarantee was cancelled and discharged. The notice of 11th March, 1966, was made an annexure of the affidavit.

The C. M.P. was placed before the Court on 23rd March, 1966, when the legal representatives of Dr. Kaul were ordered to be joined and the Bank was ordered not to pay the amount to anyone including the Sales Tax Officer. One R. N. Kaul (brother of Dr.M.N. Kaul) was brought on record as the legal representative. Dr. Kaul had left behind no issue, male or female. The State of Maharashtra

repeated its demands by another petition dated 25th November, 1966. R. N. Kaul appeared and filed an affidavit in reply opposing payment of the amount under the guarantee and the payment of the deficit amount from the security amount.

In view of this opposition, the matter was heard fully. The terms of the guarantee may now be seen. The guarantee is in the form of a letter addressed to the Registrar of this Court. The first two paragraphs at its forefront are preambles setting out the circumstances in which the guarantee came to be furnished. The operative part reads:

"*And whereas the National and Grindlays Bank Limited*, a Licensed Bank, having its branch office at Chandni Chowk, Delhi, has agreed with Dr. M. N. Kaul, Delhi to furnish in your favour a guarantee in the sum of Rs. 18,240-06 P. (Rupees eighteen thousand two hundred and forty and six naye paise) fixed by the Court as aforesaid.

Now therefore in pursuance of the said Order of the Court dated the 12th February, 1962, and in consideration of the said agreement between Dr. M.N. Kaul of Delhi and the National and Grindlays Bank Limited, Delhi, *hereby Guarantee* to you the payment on demand of a sum not exceeding Rs. 18,240-06 P. (Rupees eighteen thousand two hundred and forty and six naye paise) only in the event of the above mentioned Writ Petition No. 9 of 1962, filed by Dr. M. N. Kaul, Delhi, being dismissed by the Supreme Court of India, and/or the said Court holding that Dr. M.N. Kaul, Delhi, is liable to pay the sales tax Rs. 18,240.06 P. (Rupees eighteen thousand two hundred and forty and six naye paise only) to the said respondent.

And the National and Grindlays Bank Limited, Delhi, declares that this Guarantee shall remain in force until one calendar month after the date of the pronouncement of the Judgment and/or a period of *twelve months* from the date of the execution of the *guarantee* whichever is later and/or the *drawing and sealing of the order* (as the case may be) of the *Supreme Court* finally disposing of the said petition filed by Dr. M. N. Kaul of Delhi."

The question is whether this guarantee is enforceable. That depends upon the terms under which the guarantor bound himself. Under the law he cannot be made liable for more than he has undertaken. It is often said that a surety is a favoured debtor, for in the expressive phrase of Lord Westbury, L.C. in *Blest* v. *Brown*[1].

"you bind him to the letter of his engagement.

Beyond the proper interpretation of the engagement you have no hold upon him."

These observations have been recalled in cases of guarantee and suretyship by the Judicial Committee and also this Court. See for example *Pratapsing Moholalbhai and another* v. *Keshavlal Harilal Setalvad and another*[2], and *M. S. Anirudhan* v. *Thomco's Bank Ltd.*[3]. To this there are some exceptions. In case of ambiguity when all other rules of construction fail the Courts interpret the guarantee *contra proferentem* that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement.

Judging of the letters of guarantee from this standpoint it is clear that the Bank bound itself to pay on demand the sum of Rs. 18,240-06 P. only in the event of the Writ Petition being dismissed and/or this Court holding Dr. M. N. Kaul liable. The guarantor however put a time-limit on the guarantee. According to the last paragraph the contract was to remain in force:

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1. (1862) 4 De. G.F. & J. 367 at 376.
2. (1934) L.R. 62 I.A. 23 at 33: 68 M.L.J. 339.
3. (1964) 1 An.W.R. (S.C.) 137 : (1964) 1 M.L.J. (S.C.) 137: (1964) 1 S.C.J. 495: (1963) 1 S.C.R. (Supp.) 63 at 77.

(i) for one calendar month after the pronouncement of the judgment and/or

(ii) (*a*) a period of 12 months from the date of the execution of the guarantee whichever be later and/or

(*b*) the drawing and sealing of the order (as the case may be) of the Supreme Court finally disposing of the petition of Dr. Kaul.

The Sales-tax authorities can take advantage of any of the above conditions. It will be recalled that the order of this Court was passed on 15th March, 1965. Under (i) time for enforcement was available till 15th April, 1965. Under (ii) (*a*) as the guarantee was executed on 23rd March, 1962, one year expired on 23rd March, 1963. Condition (ii) (*b*) does not apply because no order was drawn up or sealed. Thus the last date for enforcement of the guarantee was 15th April, 1965. No attempt was made so to enforce it and the guarantee was not available thereafter.

Mr. Dhebar sought to increase the liability by reading the recitals and also by making the first paragraph of the operative part of the guarantee to speak. This is not possible. The guarantee in this form was accepted by the party concerned as well as this Court and it is impossible to ignore the time limit which is an integral part of the guarantee. The contention of the Bank that the guarantee is no longer enforceable is therefore right. Of course if the Bank can be made to part with the money belonging to Dr. M. N. Kaul under any other procedure open to the Sales tax authorities, the Bank would be bound legally to pay it over but the guarantee cannot be enforced.

As regards the sum of Rs. 1,341.44 P. which is sought to be recovered from the amount deposited by Dr. Kaul as security for costs, it is obvious that that cannot be ordered. The sum of Rs. 2,500 is available only to meet costs and as in this case costs have not been ordered that sum cannot be touched. In the result, the two notices of motion must fail and they are dismissed. The costs of the hearing shall be borne by the State of Maharashtra.

S.V.J. *Petitions dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, *Chief Justice*, J. C. SHAH, J. M. SHELAT, V. BHARGAVA AND G. K. MITTER, JJ.

Bhagat Raja .. *Appellant**

v.

The Union of India and others .. *Respondents.*

Mines and Minerals (Regulation and Development) Act (LXVII of 1957), *sections* 11 *and* 30 *and Mineral Concession Rules,* 1960, *rules* 26, 54 *and* 55—*Revisional powers of Central Government—Quasi-judicial—Whether Central Government should give reasons while exercising its powers of revision—Speaking order, necessity of.*

Section 11 (3) of the Act LXVII of 1957 prescribes the matters which the State Government must consider before selecting one out of the numerous applicants. Rule 26 of the Rules framed under the Act insists on a speaking order to be made.

Section 30 of the Act empowers the Central Government to revise the order of the State Government *suo motu* or on the application of the aggrieved party; rule 54 enables him to make an application in Form N. and rule 55 prescribes the procedure to be followed.

In exercising its powers of revision under rule 55 the Central Government must take into consideration not only the material which was before the State

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* C.As. Nos. 2596 and 2597 of 1966. • 29th March, 1967.

Government but comments and counter-comments, if any, which the parties may make regarding the order of the State Government. Hence, of necessity, the Central Government has to scrutinise matters which were not canvassed before the State Government.

In exercising its powers of revision under rule 55 the Central Government discharges functions which are quasi-judicial. It is well settled that the decisions of Tribunals in India are subject to the supervisory powers of the High Court under Article 227 of the Constitution of India and of the appellate powers of the Supreme Court under Article 136. Both the High Courts and the Supreme Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected" or "dismissed". The order therefore must be a speaking order notwithstanding rule 55 does not state so.

When the authority whose decision is to be reviewed gives reasons for its conclusions and the reviewing authority affirms the decision for the reasons given by the lower authority, one can assume that the reviewing authority found the reasons given by the lower authority as acceptable to it, but, where as in the instant case, the lower authority itself fails to give any reason other than that the successful applicant was an old lessee and the reviewing authority does not even refer to that ground, Courts exercising supervisory or appellate powers have to grope in dark for finding out reasons for upholding or rejecting the decision. The case for giving reasons or for making a speaking order becomes much stronger where the decision can be challenged not only by the issue of a writ of *certiorari* but on appeal to the Supreme Court.

Appeals by Special Leave from the Orders dated the 2nd May, 1966, and 22nd June, 1966 of the Government of India, Ministry of Mines and Metals, New Delhi on applications filed by the appellant under rule 54 of the Minerals Concession Rules, 1960.

S. J. Sorabji and *A. J. Rana*, Advocates, and *J. R. Gagrat* and *B. R. Agarwal*, Advocates of *M/s. Gagrat & Co.*, for Appellant (In both the Appeals).

G. N. Dikshit, Advocate and *R. N. Sachthey*, Advocate for *S. P. Nayyar*, Advocate, for Respondent 1 (In both the Appeals).

P. Ram Reddy, Senior Advocate, (*B. Parthasarathy*, Advocate, with him), for Respondent 2 (In both the Appeals).

M. C. Setalvad, Senior Advocate, (*B. Dutta*, Advocate and *O. C. Mathur*, Advocate for *M/s. J. B. Dadachanji & Co.*, with him), for Respondent 3 (In both the Appeals).

The Judgment of the Court was delivered by

Mitter, J.—These two appeals, by Special Leave, are limited to the question as to whether in dismissing a revision and confirming the order of the State of Andhra Pradesh, the Union of India was bound to make a speaking order. The text of the order is the same in both the cases, the only difference being in the situs and the area in respect of which the lease was applied for. One of the orders runs as follows:

"

New Delhi,
the 22nd June, 1966.

* * * * *

I am directed to refer to your revision application dated 14th December, 1964 and letter dated 28th January, 1966 on the above subject and to say that after careful consideration of the grounds stated therein, the Central Government have come to the conclusion that there is no valid ground for interfering with the decision of the Government of Andhra Pradesh rejecting your application for grant of mining lease for asbestos over an area of Ac. 113-50 in Brahmanapalli village

Cuddapah District, Andhra Pradesh. Your application for revision is, therefore, rejected."

The facts leading to the two appeals are as follows :—In response to a notification dated 8th January, 1964 published in the State Gazette by the Andhra Pradesh Government inviting applications under rule 58 of the rules framed under the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as the Rules and the Act) the appellant submitted two applications in the prescribed form *viz.*, Form "I" for areas aggregating Ac. 113-50 in village Brahmanapalli and Ac. 13-10 in village Ippatta both in the district of Cuddapah for mining asbestos. Respondent No. 3 also made similar applications on the same date. According to the appellant his applications complied with all the requirements of Form "I" while those of respondent No. 3 were defective in some respects. Besides the appellant and the respondent No. 3, there was only one other person who applied for a prospecting licence which was rejected off-hand. As between the appellant and the respondent No. 3, the Government of Andhra Pradesh preferred the latter. The relevant portion of the order dated 19th October, 1964 in respect of the village Brahmanapalli under section 10 (3) of the Act was as follows:

"As between the other applicants Sri Bhagat Raja and M/s. Tiffin's Barytes, Asbestos and Paints Ltd., the Government prefer M/s. Tiffin's Barytes........ as they are having adequate general experience and technical knowledge, and are old lessees in the district, without any arrears of mineral dues to the Government. The mining lease application of Sri Bhagat Raja for the areas covered the mining lease application of M/s. Tiffin's Barytes, Asbestos and Paints Ltd. is rejected."

The text of the order with regard to village Ippatta is practically the same.

The appellant filed application in revision in the prescribed form *i.e.*, Form 'N' under section 30 of the Act read with rule 54 to the Union of India on 14th December, 1964. The appellant tried to bring out in his revision applications that the financial condition of the 3rd respondent was extremely precarious as would be evidenced by the documents, copies whereof were annexed to his petition. The 3rd respondent filed a counter-statement to the revision application in April, 1965. In March, 1966 the appellant received the comments of the Andhra Pradesh Government on his revision applications. The appellant filed rejoinder to the counter-statements of the 3rd respondent in May, 1965 and to the comments of the Andhra Pradesh Government in April, 1966. He also asked for the grant of a personal hearing before the decision of the case which was not given. Ultimately, his applications were rejected by orders quoted hereinabove.

Various grounds of appeal were taken in the application for Special Leave to appeal preferred by the appellant. An attempt has been made therein to show that respondent No. 3 had no experience in asbestos mining, that its financial position was very unsatisfactory and that its application for mining lease was not in proper form. A complaint was also made that in rejecting the applicant's revision applications the Union of India was bound to give reasons for its decision as it was exercising quasi-judicial powers under section 30 of the Act read with rules 54 and 55, that principles of natural justice and fairplay requiring the divulgence of the grounds were violated and that a personal hearing should have been given to the appellant before the disposal of the revision applications.

We are not called upon in this case to go into the merits of the case but only to examine the question as to whether it was necessary for the Government of India to give reasons for its decision in view of the provisions of the Act and the Rules or

aliunde because the decision was liable to be questioned in appeal to this Court. It is necessary to take note of a few provisions of the Act and the relevant rules framed thereunder to ascertain the scope of a party's right to apply for a lease and the powers and duties of the Government in accepting or rejecting the same. The preamble to the Act shows that its object was to provide for the regulation of mines and the development of minerals under the control of the Union of India. Under section 4 (1) no person can undertake any propsecting or mining operations in any area, except under and in accordance with the terms and conditions of a prospecting licence or a mining lease granted under the Act and the Rules. Under sub-section (2) of the section:

> " No prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder."

Section 5 lays down certain conditions which a person desiring to have a mining lease must fulfil. Section 8 provides for the period for which a mining lease may be granted. Under section 10 (1) an application for a mining lease has to be made to the State Government concerned in the prescribed form. Sub-section (3) of section 10 runs as follows :

> " On receipt of an application under this section, the State Government may, having regard to the provisions of this Act and any rules made thereunder, grant or refuse to grant the licence or lease."

Under sub-section (2) of section 11 a person whose application for a licence is received earlier than those of others shall have a preferential right for the grant thereof over the others. The proviso to this sub-section enacts that where applications are received on the same day, the State Government, after taking into consideration the matters specified in sub-section (3), may grant the mining lease to such one of the applicants as it may deem fit. Sub-section (3) specifies the matters, referred to in sub-section (2) and they are as follows :—

(*a*) any special knowledge or experience in, prospecting operations or mining operations, as the case may be, possessed by the applicant;

(*b*) the financial resources of the applicant;

(*c*) the nature and quality of the technical staff employed or to be employed by the applicant; and

(*d*) such other matters as may be prescribed.

Section 13 (1) enables the Central Government to make rules for regulating the grant of prospecting licences and mining leases. Under section 19 any mining lease granted, renewed or acquired in contravention of the provisions of the Act is to be void and of no effect. Power of revision of the order of the State Government is given to the Central Government in the following terms:

> " [S.30] The Central Government may, of its own motion or on application made within the prescribed time by the aggrieved party, revise any order made by a State Government or other authority in exercise of the powers conferred on it by or under this Act."

Rules were made by the Central Government under section 13 of the Act known as the Mineral Concession Rules, 1960. Rule 22 prescribes that an application for the grant of a mining lease must be made to the State Government in Form "I " accompanied by a fee of Rs. 200, a deposit of Rs. 500 and an income-tax clearance certificate. Under rule 26 the State Government is obliged to give reasons for refusal to grant a mining lease. Any person aggrieved by an order

made by the State Government may prefer an application for revision under rule 54 in Form 'N.' In every such application against the order of the State Government refusing to grant a mining lease, a person to whom a lease has been granted must be impleaded as a party. Rule 55 originally framed in 1960 was amended in July, 1965. Under the amended rule 55 the position is as follows :—

"(1) On receipt of an application for revision under rule 54, copies thereof shall be sent to the State Government and to all the impleaded parties calling upon them to make such comments as they may like to make within three months of the date of issue of the communication and if no comments are received within that period, it is to be presumed that the party omitting to make such comments has none to make.

(2) On receipt of the comments from any party under sub-rule (1), copies thereof have to be sent to the other parties calling upon them to make further comments as they may like to make within one month from the date of the issue of the communication.

(3) The revision application, the communications containing comments and counter-comments referred to in sub-rules (1) and (2) shall constitute the record of the case.

(4) After considering the records referred to in sub-rule (3), the Central Government may confirm, modify or set aside the party omitting to make such comments has none to make deem just and proper."

From the above, it will be amply clear that in exercising its powers of revision under rule 55 the Central Government must take into consideration not only the material which was before the State Government but comments and counter-comments, if any, which the parties may make regarding the order of the State Government. In other words, it is open to the parties to show how and where the State Government had gone wrong, or, why the order of the State Government should be confirmed. A party whose application for a mining lease is turned down by the State Government is therefore given an opportunity of showing that the State Government had taken into consideration irrelevant matters or based its decision on grounds which were not justified. At the time when applications for a licence are made by different parties to the State Government, they are not given an opportunity of showing any defects or demerits in the applications of the others or why their applications should be preferred to others. The State Government has to make up its mind by considering the applications before it as to which party is to be preferred to the other or others. Section 11 (3), as already noted, prescribes the matters which the State Government must consider before selecting one out of the numerous applicants. But the possibility of the State Government being misled in its consideration of matters cannot be ruled out. It may be that a party to whom a lease is directed to be granted has in fact no special knowledge or experience requisite for the mining operation or it may be that his financial resources have not been properly disclosed. It may also be that the nature and quality of the technical staff employed or to be employed by him is not of the requisite standard. In an application for revision under rule 55 it will be open to an aggrieved party to contend that the matters covered by sub-section (3) of section 11 were not properly examined by the State Government, or that the State Government had not before it all the available material to make up its mind with respect thereto before granting a licence. In a case where complaints of this nature are made, of necessity, the Central Government has to scrutinise matters which were not canvassed before the State Government. A question may arise in such cases as to whether the order of the Central Government in the form in which it was made in this case would be sufficient, specially in view of the fact that the correctness thereof may be tested in appeal to this Court.

It is now well settled that in exercising its powers of revision under rule 55 the Central Government discharges functions which are quasi-judicial: see *Shivji Nathubhai* v. *The Union of India* and *others*[1], and *M. P. Industries* v. *Union*[2]. In the latter case one of us (our present Chief Justice) said (at page 471):

"The entire scheme of the rules posits a judicial procedure and the Central Government is constituted as a tribunal to dispose of the said revision. Indeed this Court in *Shivji Nathubhai* v. *The Union of India*[1], rules that the Central Government exercising its power of review under rule 54 of the Mineral Concession Rules, 1949, was acting judicially as a tribunal. The new rule, if at all, is clearer in that regard and emphasises the judicial character of the proceeding. If it was a tribunal, this Court under Article 136 of the Constitution can entertain an appeal against the order of the Central Government made in exercise of its revisional powers under rule 55 of the Rules."

Let us now examine the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review. It was argued that the very exercise of judicial or quasi-judicial powers in the case of a tribunal entailed upon it an obligation to give reasons for arriving at a decision for or against a party. The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected," or, "dismissed." In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the others, as it must, and the Central Government adopts the reasoning of the State Government, this Court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this Court, in appeal may have to examine the case *de novo* without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this Court, in appeal, may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. In such circumstances, what is known as a "speaking order" is called for.

The order of the Central Government of 22nd June, 1966 is so worded as to be open to the construction that the reviewing authority was primarily concerned with finding out whether any grounds had been made out for interfering with the decision of the State Government. In other words, the Central Government was not so much concerned to examine the grounds or the reasons for the decision of the State Government but to find out whether there was any cause for disturbing the same, *prima facie* the order does not show that the reviewing authority had any thought of expressing its own reasons for maintaining the decision arrived at. If detailed reasons had been given by the State Government and the Central Government had indicated clearly that it was accepting the reasons for the decision of the State Government, one would be in a position to say that the reasons for the grant of a lease to a person other than the appellant were obvious. But, where as here,

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1. (1960) S.C.J. 579 : (1960) 2 S.C.R. 775. A.I.R. 1966 S.C. 671.
2. (1966) 1 S.C.J. 204 : (1966) 1 S.C.R. 466 :

the State Government does not find any fault or defect in the application of the unsuccessful applicant and merely prefers another on the ground that "he had adequate general experience and technical knowledge and was an old lessee without any arrears of mineral dues" it is difficult to say what turned the scale in favour of the successful applicant excepting the fact that he was known to the State Government from before. We do not want to express any views on this but if this be a proper test, then no new entrant in the field can have any chance of success where there is an old lessee competing with him. The order of the Central Government does not bring out any reason for its own decision except that no grounds for interference with the decision arrived at was established.

Now we propose to examine some decisions of this Court where the question as to whether the reviewing authority should give reasons for its decisions was gone into. In *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala*[1] this Court had to consider whether the Central Government exercising appellate powers under section 111 of the Companies Act, 1956 before its amendment in 1960 was a tribunal exercising judicial functions and as such, subject to the appellate jurisdiction of this Court under Article 136 of the Constitution and whether the Central Government had acted in excess of its jurisdiction, or acted illegally otherwise in directing the company to register the transfer or transfers in favour of the respondents. There, the articles of association of the company concerned gave the directors the right in their absolute discretion and without assigning any reason to refuse to register any transfer of shares. The directors declined to register some shares in the name of the transferees who applied to the High Court at Bombay for orders under section 38 of the Indian Companies Act, 1913 for rectification of the share register on the ground that the board of directors had exercised their right *mala fide* arbitrarily and capriciously. The High Court rejected these petitions on the ground that controversial questions of law and fact could not be tried in summary proceedings under section 38. The transferees requested the directors once more to register the shares. On their refusal to do so, appeals were preferred to the Central Government under section 111 (3) of the Indian Companies Act, 1956 which had since come into operation. The Joint Secretary, Minister of Finance, who heard the appeals declined to order registration of transfers practically on grounds similar to those put forward by the High Court of Bombay. Thereafter, the original holder of the shares transferred some shares to his son and some to his daughter-in-law and the transferees requested the company to register the transfers. The directors once more refused. Against the resolution of the directors, separate appeals were preferred by the son and daughter-in-law of the original holder of the shares. The Deputy Secretary to the Government of India set aside the resolution passed by the board of directors and directed the company to register the transfers. No reasons were however given for such order. The company came up in appeal to this Court under Article 136 of the Constitution. According to the judgment of the majority of Judges, the exercise of authority by the Central Government was judicial as it had to adjudicate upon the rights of contesting parties when there was a *lis* between them. It was observed in that case that—

> "If the Central Government acts as a tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of this Court under Article 136 of the Constitution, we failed to see how the power of this Court can be effectively exercised if reasons are not given by the Central Government in support of its order."

This Court further held that there had been no proper trial of the appeals, no reasons having been given in support of the orders of the Deputy Secretary who heard them and in the result, the orders were quashed with a direction that the appeals be reheard and disposed of according to law.

In *Sardar Govindrao v. State*[2] the appellants who claimed to be descendants of former ruling chiefs in some districts of Madhya Pradesh applied under the

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1. (1963) 1 S.C.J. 471: (1962) 2 S.C.R. 339 at p. 357.
2. (1966) 1 S.C.J. 480 : (1965) 1 S.C.R. 678.

Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948 for grant of money or pension as suitable maintenance for themselves. They held estates in two districts on favourable terms as *Jahgirdars Maufidars* and *Ubaridars* and enjoyed an exemption from payment of land revenue aggregating Rs. 27,828-5-0 per year. On the passing of the Act, the exemption was lost and they claimed to be entitled to grant of money or pension under the provisions of the Act. They applied to the Deputy Commissioner who forwarded their applications to the State Government. These were rejected without any reasons being given therefor. The appellants filed a petition in the High Court of Madhya Pradesh under Article 226 of the Constitution for a writ of *certiorari* to quash the order of the State Gover nment. The High Court held that the State Government " was not compelled to grant either money or pension because the exercise of the power under section 5 was discretionary and the petition, therefore was incompetent." Section 5 (3) of the C.P. and Berar Act provided as follows :—

" The Provincial Government may make a grant of money or pension—

(*i*) for the maintenance or upkeep of any religious, charitable or public institution or service of a like nature, or

(*ii*) for suitable maintenance of any family of a descendant from a former ruling chief."

Section 6 barred the jurisdiction of civil Courts. It was observed by this Court :

" The Act lays down upon the Government a duty which obviously must be performed in a judicial manner. The appellants did not seem to have been heard at all. The Act bars a suit and there is all the more reason that Government must deal with such case in a quasi-judicial manner giving an opportunity to the claimants to state their case in the light of the report of the Deputy Commissioner. The appellants were also entitled to know the reason why their claim for the grant of money or a pension was rejected by Government and how they were considered as not falling within the class of persons who it was clearly intended by the Act to be compensated in this manner..........As the order of Government does not fulfil the elementary requirements of a quasi-judicial process we do not consider it necessary to order a remit to the High Court."

In the result this Court set aside the order of Government and directed the disposal of the case in the light of the remarks made.

In *M. P. Industries* v. *Union*[1], the order of the Central Government rejecting the revision application under rule 55 of the Mineral Concession Rules was couched in exactly the same language as the order in appeal before us (see at page 475 of the report). One cannot help feeling that the Ministry concerned have a special form which is to be used whenever a review application is to be rejected. This may easily lead anyone to believe that the review is a sham and nothing but the formal observance of the power granted to the Central Government. In that case, all the three learned Judges of this Court who heard the appeal were unanimous in dismissing it : some of the observations made bear repetition. It was there argued that if the Central Government had to give reasons when it functioned as a tribunal, it would obstruct the work of the Government and lead to unnecessary delays. As to this it was said by our present Chief Justice :

" The Central Government functions only through different officers and in this case it functioned through an Under Secretary. The condition of giving reasons is only attached to an order made by the Government when it functions judicially as a tribunal in a comparatively small number of matters and not in regard to other administrative orders it passes............

1. (1966) 1 S.C.J. 204: (1966) 1 S.C.R. 466.

Our Constitution posits a welfare State............ In the context of a welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimise arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimises arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.

.... If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are given it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard."

It was further observed in that case that the position of ordinary Courts of law was different from that of tribunals exercising judicial functions and it was said:

" A Judge is trained to look at things objectively, uninfluenced by considerations of policy or expediency; but an executive officer generally looks at things from the standpoint of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties; and the least they should do is to give reasons for their orders. Even in the case of appellate Courts invariably reasons are given, except when they dismiss an appeal or revision *in limine* and that is because the appellate or revisional Court agrees with the reasoned judgment of the subordinate Court or there are no legally permissible grounds to interfere with it. But the same reasoning cannot apply to an appellate tribunal, for as often as not the order of the first tribunal is laconic and does not give any reasons. That apart, when we insist upon reasons, we do not prescribe any particular form or scale of the reasons. The extent and the nature of the reasons depend upon each case. Ordinarily, the appellate or revisional tribunal shall give its own reasons succinctly; but in a case of affirmance where the original tribunal gives adequate reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons. What is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal. The nature and the elaboration of the reasons necessarily depend upon the facts of each case."

It must be noted however that the above view was not shared by the two other Judges of the Bench constituting this Court. It was said by them:

" For the purpose of an appeal under Article 136, orders of Courts and tribunals stand on the same footing. An order of Court dismissing a revision application often gives no reason, but this is not a sufficient ground for quashing it. Likewise, an order of an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection."

They distinguished the case of *Harinagar Sugar Mills Ltd.*[1], on the ground that the Central Government had reversed the decision appealed without giving any reasons and the latter did not disclose any apparent grounds for reversal and added:

" There is a vital difference between the order of reversal by the appellate authority in that case for no reason whatsoever and the order of affirmance by the revising authority in the present case ".

1. (1963) 1 S.C.J. 471 : (1962) 2 S.C.R. 339.

As has already been noted, the board of directors in that case did not give any reasons for the refusal to register and the Central Government adopting the same course reversed the decision of the directors without giving any reasons. Clearly the act of the Central Government there savoured of arbitrariness. Under the articles of association of the company, the directors were not obliged to give, any reasons. Their power of refusal was unrestricted if they acted *bona fide* or in the interest of the company. The reversal of their discretion clearly amounted to a finding that they had acted arbitrarily or *mala fide* and one was left to guess the reasons of the Central Government for coming to this conclusion. As has already been said, when authority whose decision is to be reviewed gives reasons for its conclusion and the reviewing authority affirms the decision for the reasons given by the lower authority, one can assume that the reviewing authority found the reasons given by the lower authority as acceptable to it; but, where the lower authority itself fails to give any reason other than that the successful applicant was an old lessee and the reviewing authority does not even refer to that ground, this Court has to grope in the dark for finding out reasons for upholding or rejecting the decision of the reviewing authority. After all a tribunal which exercises judicial or quasi-judicial powers can certainly indicate its mind as to why it acts in a particular way and when important rights of parties of far reaching consequence to them are adjudicated upon in a summary fashion, without giving a personal hearing where proposals and counter-proposals are made and examined, the least that can be expected is that the tribunal should tell the party why the decision is going against him in all cases where the law gives a further right of appeal.

On behalf of the respondents, it was contended that rule 55 which provided for a revision did not envisage the filing of fresh pleadings and fresh material but only invited comments of the parties with regard to the matter before the Central Government. It was argued that if after going through the comments and counter-comments the Central Government found no reason to arrive at a conclusion different from that of the State Government, it was not called upon to disclose any grounds for its decision in review. Our attention was drawn in particular to rule 26 of the Mineral Concession Rules which enjoined upon the State Government to communicate in writing the reasons for any order refusing to grant or renew a mining lease. The absence of any provision in rule 55 for giving such reasons was said to be decisive on the matter as indicative of the view of the legislature that there was no necessity for giving reasons for the order on review. We find ourselves unable to accept this contention. Take the case where the Central Government sets aside the order of the State Government without giving any reasons as in *Harinagar Sugar Mills case*.[1] The party who loses before the Central Government cannot know why he had lost it and would be in great difficulty in pressing his appeal to the Supreme Court and this Court would have to do the best it could in circumstances which are not conducive to the proper disposal of the appeal. Equally, in a case where the Central Government merely affirms the order of the State Government, it should make it clear in the order itself as to why it is affirming the same. It is not suggested that the Central Government should write out a judgment as Courts of law are wont to do. But we find no merit in the contention that an authority which is called upon to determine and adjudicate upon the rights of parties subject only to a right of appeal to this Court should not be expected to give an outline of the process of reasoning by which they find themselves in agreement with the decision of the State Government. As a matter of fact, rule 26 considerably lightens the burden of the Central Government in this respect. As the State Government has to give reasons, the Central Government after considering the comments and counter-comments on the reasons given by the State Government should have no difficulty in making up its mind as to whether the reasoning of the State Government is acceptable and to state as briefly as possible the reasons for its own conclusion.

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1. (1963) 1 S.C.J. 471 : (1962) 2 S.C.R. 339.

Our attention was drawn to a judgment of this Court in *Nandram Hunatram, Calcutta* v. *Union of India*[1]. There, one of the points made by the appellant in the appeal to this Court was that the order of the Central Government, in review, upholding the action of the State Government cancelling the mining lease granted to the appellant was bad inasmuch as no reasons were given. It was pointed out in the judgment in that case that the facts there were so notorious that the reasons for the action of the State Government and the confirmation of its order by the Central Government were too obvious and could not possibly be questioned by anybody. There the partners of the appellant firm had fallen out among themselves and none of them was willing to spend money on the colliery with the result that the work came to a stand-still and the colliery began to get flooded. At this juncture, Government stepped in and made a promise to the essential workmen that their wages would be paid and this saved the colliery. Thereafter, the Chief Inspector of Mines was informed by one of the partners of the appellant firm that the other partners were preventing him from making payment for running expenses of the colliery and that he was not in a position to perform his duties as an occupier. He accordingly resigned his office. The Manager also resigned and the Sub-Divisional Officer of the district informed Government that the situation had become so alarming that some action on the part of the Government was absolutely necessary. In spite of notice, the partners refused to take any action with the result that the Government took over the colliery and terminated the lease. The revision application filed before the Central Government under rule 54 of the rules was turned down without giving any reasons. Negativing the contention of the appellant that the order of the Central Government was bad in law because no reasons were given, it was said by this Court that,

> "The documents on the record quite clearly establish that the colliery was being flooded as the essential services had stopped functioning and but for the timely intervention of the State Government the colliery would have been lost. In these circumstances, it is quite clear that the action of the State Government was not only right but proper and this is hardly a case in which any action other than rejecting the application for revision was called for and a detailed order was really not required because after all the Central Government was merely approving of the action taken in the case by the State Government, which stood completely vindicated............ The action of the State Government far from being arbitrary or capricious was perhaps the only one to take and all that the Central Government has done is to approve of it".

The last portion of the passage was relied upon by the Counsel for the respondents in support of his argument that as the order in review is merely in confirmation of the action of the State Government reasons need not be given. But the above dictum cannot be considered dissociated from the setting of the circumstances in which it was made. There it was plain as a pike-staff that the State Government had no alternative but to cancel the lease: the absence of any reasons in the order on review could not possibly leave any body in doubt as to what the reasons were. As a matter of fact in the setting of facts, the reasons were so obvious that it was not necessary to set them out. There is nothing in this decision which is contrary to *M. P. Industries* v. *Union*[2]. What the decision says is that the reasons for the action of the State were so obvious that it was not necessary, on the facts of the case, to repeat them in the order of the Central Government.

Our attention was also drawn to another judgment of this Court in *Commissioner of Income-tax* v. *K. V. Pilliah*[3]. One of the questions in that case before the High Court of Mysore under section 66 (2) of the Indian Income-tax Act was whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in sustaining both the addition of Rs. 41,142 as income from business

1. (1967) 2 S.C.J. 141 : A.I.R. 1966 S.C. 1922.
2. (1966) 1 S.C.J. 204: (1966) 1 S.C.R. 466.
3. (1967) 63 I.T.R. 411.

and Rs. 7,000 as cash credits, and whether such addition did not result in double taxation. It was held by this Court that the question whether Rs. 41,142 was liable to be taxed fell to be determined under the first question. In respect of the other amount of Rs. 7,000 the Income-tax Officer had held that the explanation of the assessee was untrue and the Appellate Assistant Commissioner and the Tribunal had agreed with that view. In this setting of facts, it was said by this Court :

"The Income-tax Appellate Tribunal is the final fact finding authority and normally it should record its conclusion on every disputed question raised before it, setting out its reasons in support of its conclusion. But, in failing to record reasons, when the Appellate Tribunal fully agrees with the view expressed by the Appellate Assistant Commissioner and has no other ground to record in support of its conclusion, it does not act illegally or irregularly, merely because it does not repeat the grounds of the Appellate Assistant Commissioner on which the decision was given against the assessee or the department. The criticism made by the High Court that the Tribunal had "failed to perform its duty in merely affirming the conclusion of the Appellate Assistant Commissioner" is apparently unmerited. On the merits of the claim for exclusion of the amount of Rs. 7,000 there is no question of law which could be said to arise out of the order of the Tribunal."

The above observations were sought to be pressed into service by the Counsel for the respondents but there is a good deal of difference between that case and the one with which we have to deal. The High Court there was merely called upon to give its opinion on the statement of facts set out by the Appellate Tribunal. It was for the Income-tax Officer in the first instance to accept or reject the explanation with regard to the cash credit. If the Income-tax Officer found the assessee's explanation unacceptable he had to say why he did not accept it. Unless the assessee in appeal was able to point out to the Appellate authorities some flaw in the reasoning of the Income-tax Officer it is not necessary for the appellate authorities to give their reasons independently. The explanation of the assessee is either accepted or rejected; but in the case which we have before us the State Government has to consider the merits and demerits of the applications and to give its reasons why it prefers one to the other or others. There is a dispute between two or more contesting parties and the reasons for preferring one to the other or others may be more than one. It is not a question of accepting or rejecting an explanation. In our opinion what was said in the above Income-tax case will not apply in the case of a review by the Central Government of a decision of the State Government under the Act and the Rules.

It may be of interest to note that in *Rex* v. *Northumberland Compensation Appeal Tribunal* Ex parte *Shaw*[1] an application was made in the King's Bench Division in England for an order of *certiorari* for the quashing of a decision reached by the Compensation Appeal Tribunal dismissing an appeal by Shaw against an award to him of compensation for loss of employment as a clerk to a Hospital Board payable under the National Health Service (Transfer of Officers and Compensation) Regulations, 1948. There the question of the practice and procedure with regard to the issue of a writ of *certiorari* was gone into at some length. The tribunal in that case had made a speaking order. It was contended by the Counsel for the tribunal that the King's Bench Division had no power to examine the order in the case before it on *certiorari* on the ground that *certiorari* went only to defect of jurisdiction. This was turned down and the Divisional Court held that it had jurisdiction to quash by *certiorari* the decision of an inferior tribunal when the latter had embodied the reasons for its decision in its order and those reasons are bad in law. For our purpose we need only refer to the observations of Lord Goddard, C.J., at page 724 of the report where he said :

"I think it is beneficial in this case that we should do so not merely having regard to the facts of this case, but because so many tribunals have now been set up, all of whom I am certain, desire to do their duty on the best way, and are

1. L.R. (1951) 1 K.B. 711.

often given very difficult sets of regulations and statutes to construe. In certainly must be for their benefit, and I have no doubt but that they will welcome, that this Court should be able to give guidance to them if, in making their orders, they make their orders speaking orders so that this Court can then consider them if they are brought before the Court on *certiorari*."

The case for giving reasons or for making a speaking order becomes much stronger when the decision can be challenged not only by the issue of a writ of *certiorari* but an appeal to this Court.

Counsel for the respondents referred us to the comment on this case made by Sri C. K. Allen in his Law and Order (Second Edition) at page 259 to page 261 According to the learned Author, the Northumberland Compensation case might be a greater deterrent than encouragement to speaking orders inasmuch as "the prospect of having their mental proeess set forth in literary form might be extremely disagreeable to them" and up to the year 1956 did not seem to have assisted greatly the means of recourse against decisions of inferior jurisdictions. Speaking for ourselves with great respect to the learned author we do not think that the position of the Central Government as a reviewing authority under the Mineral Concession Rules can be equated with an appellate tribunal of the type whose decision was before the King's Bench Division in England. If the State Government is enjoined by law to give its reasons there is no reason why it should be difficult for the appellate authority to do so. The necessity and the desirability of tribunals making speaking orders has been adverted upon by different High Courts in India. Thus in *Vedachala Mudaliar* v. *State of Madras*[1], where the State Government of Madras set aside the order of the Central Road Traffic Board without giving an reasons, it was observed that—

"When the policy of the Legislature is to confer powers on administrative tribunals with a duty to discharge their functions judicially I do not see any reason why they should be exempted from all those safeguards inherent in its exercise of that jurisdiction..........From the stand point of fair name of the tribunals and also in the interest of the public, they should be expected to give reasons when they set aside an order of an inferior tribunal........ Further, if reasons for an order are given, there will be less scope for arbitrary or partial exercise of powers and the order "*ex facie*" will indicate whether extraneous circumstances were taken into consideration by the tribunal in passing the order."

Reference may also be made to *Ramayya* v. *State of Andhra*[2], and *Annamalai* v. *State of Madras*[3]. To the same effect is the judgment of the Kerala High Court in *Joseph* v. *Superintendent of Post Offices, Kottayam*[4].

We have already commented that the order of the Central Government in this case is couched in the same language as was used in the case before this Court in *M. P. Industries* v. *Union*[5] in August, 1965. The old rule 55 was replaced by a new rule which came into force on 19th July, 1965. Whereas the old rule directed the Central Government to consider comments on the petition of review by the State Government or other authority only, the new rule is aimed at calling upon all the parties including the State Government to make their comments in the matter and the parties are given the right to make further comments on those made by the other or others. In effect, the parties are given a right to bring forth material which was not before the State Government. It is easy to see that an unsuccessful party may challenge the grant of a lease in favour of another by pointing out defects or demerits which did not come to the knowledge of the State Government. The order in this case does not even purport to show that the comments and counter-comments, which were before the Central Government in this case, had been considered. It would certainly have been better if the order of 22nd June, 1966, had shown that the

1. (1951) 2 M.L.J. 411 : A.I.R. 1952 Mad. 276.
2. I.L.R. (1956) Andh. 712 : A.I.R. 1956 A.P. 217.
3. (1956) An. W.R. 652: A.I.R. 1957 A.P. 739.
4. A.I.R. 1961 Ker. 197.
5. (1966) 1 S.C.J. 204: (1966) 1 S.C.R. 466.

Central Government had taken into consideration all the fresh material adduced before it and for the reasons formulated they thought that the order of the State Government should not be disturbed.

In the result, the appeals are allowed and the orders of the Central Government passed on 22nd June, 1966, are set aside. The Central Government is directed to decide the review applications afresh in the light of the observations made. The appellant will get his costs throughout from the 3rd respondent.

S. V. J. *Appeals allowed; matter remitted to Central Government.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.

S. RM. CT. PL. Palaniappa Chettiar .. *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Hindu undivided family—Acquisition of shares in a company in the name of kartha *out of joint family funds—*Kartha, *managing director of the company—Remuneration paid to* kartha *as managing director—Income, if assessable in the hands of Hindu undivided family.*

Hindu law—Principles—Utilisation of joint family funds—Detriment to or user of joint family assets—Investment in shares and appointment as managing director —Real and sufficient connection essential to constitute income assessable in the hands of Hindu undivided family—Acquisition of shares long before appointment of kartha *as managing director and in the ordinary course—Remuneration, not income of Hindu undivided family.*

Income-tax Act (Central Act XI of 1922).

The assessee, a Hindu undivided family, consisting of the father and his major sons, acquired in 1934, in the name of the father, 90 shares out of 300 shares in a company, with the funds of the Hindu undivided family. On the death of one of the directors of the company, the father became a director in 1941 and on the death of another director who was managing the business, the father became the managing director with effect from 1942. By a resolution of the company, the company granted to the managing director an honorarium which was subsequently raised to Rs. 1,000 per month and 12½ per cent. commission on the net profits of the company. The only qualification for a director, under the articles of association of the company was the holding of not less than 25 shares in his own name and not jointly with any other person and acquiring the qualification within two months of appointment. For the assessment year 1959-60, the Income-tax Officer added the salary, commission and sitting fees received by the father, managing director, from the company, in the assessment of the Hindu undivided family and this was confirmed by the Appellate Assistant Commissioner in appeal. The Tribunal, however, held such remuneration received by the father was not to be treated as the income of the assessee. The High Court in the reference held against the assessee. The assessee appealed.

Held, the sums received by the father, managing director, as his remuneration, commission and sitting fees are not assessable as income of the Hindu undivided family of which he is the *kartha.*

Where the remuneration earned by themanaging director was not earned as a result of the utilisation of the joint famil funds in the business and there was no detriment to the joint family assets or the use of the joint family assets in business, such remuneration would not constitute the income of the Hindu joint family.

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*C.A. No. 1055 of 1966. 26th October 1967.

If there was a real and sufficient connection between the investment of the joint family funds and the appointment of a member of the joint family as the managing director, then the remuneration would be, as between him and the Hindu undivided family, the income of the family and would be taxable in its hands.

Held on facts: the joint family had control only of 90 out of 300 shares and the shares were purchased in the ordinary course of business and not for the purpose of qualification of the *kartha* to become a director. The shares were purchased in 1934 about 8 years before the *kartha* was appointed as the managing director. The shares were purchased by the joint family not with the object that the *kartha* should become the managing director but in the ordinary course of investment. There was no real connection between the investment of joint family funds in the purchase of the shares and the appointment of the *kartha* as managing director of the company. The remuneration was not earned by any detriment to the joint family assets.

Appeal from the judgment of the Madras High Court in T.C. No. 151 of 1962 dated 17th October, 1963.

R. Gopalakrishnan, Advocate, for Appellant.

T. A. Ramachandran and *R. N. Sachthey*, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by certificate, from the Judgment of the Madras High Court in T. C. No. 151 of 1962, dated 17th October, 1963.

The appellant (hereinafter referred to as the "assessee") is a Hindu undivided family consisting of the father and four major sons. The assessee became a shareholder in the Trichy, Sri Rangam Transport Company Ltd. (hereinafter referred to as the "company") in 1934 and owned 90 shares out of the 300 shares of the company. The shares were acquired with the funds of the Hindu undivided family of the father and his four major sons. There were initially four shareholders including the father, two of whom were directors. On the death of one of the directors, the assessee became a director in 1941 and on the death of another director who was managing the business the assessee became the managing director with effect from 1942. By a resolution dated 16th April, 1944, the company granted him an honorarium of Rs. 3,000 for the year 1943-44 and subsequently raised it gradually till it became Rs. 1,000 per month with 12½ per cent. commission on the net profits of the company. The managing director had control over the financial and administrative affairs of the company and the only qualification required was set out under Article 19 of the articles of association of the company which was to the following effect :

"The qualification of a director including the first director shall be the holding in his own right alone and not jointly with any other person of not less than 25 shares and the qualification shall be acquired within two months of appointment."

From 1938-39 to 1959-60 the assessee had been submitting returns in the status of Hindu undivided family and upto 1949-50 the assessments were completed in that status. For the assessment years 1950-51 to 1955-56, the assessments were completed in the status of individual, though returns were submitted in the status of Hindu undivided family and the remuneration was included in those assessments. For the assessment year 1956-57 the assessee submitted the return in the status of Hindu undivided family but claimed for the first time that the remuneration and sitting fees from the company should be assessed separately in the *kartha's* hands. The claim was accepted and a separate assessment made on him as an individual in respect of the remuneration and commission received from the company. This continued till the assessment for the year 1958-59. For the year ended 13th April, 1959, which was the previous year for the assessment year 1959-60, the assessee-family returned an income of Rs. 26,780 which did not include the salary, commission and sitting fees received by the *kartha* which amounted to Rs. 18,683. The Income-tax Officer added the remuneration of the *kartha* for the assessment of the Hindu undivided

family and on the basis of the decision of this Court in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1], held that the commission was to be treated as income of the family. The assessee appealed to the Appellate Assistant Commissioner but the appeal was dismissed. The assessee took the matter in further appeal to the Income-tax Appellate Tribunal, Madras Bench. The Tribunal held that the case was governed by the decision of the Madras High Court in *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*[2], and that the remuneration of the managing director ought not to be treated as income of the family. The Tribunal came to the conclusion that the judgment in *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*[2], was not affected by the decision of this Court in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1]. At the instance of the assessee the Appellate Tribunal stated a case to the Madras High Court on the following question of law :

> " Whether sums of Rs. 9,000, Rs. 8,133 and Rs. 1,550 received by the assessee as managing director's remuneration, commission and sitting fees are assessable as the income of the Hindu undivided family of which Palaniappa Chettiar is the *kartha*?"

The High Court took the view that the decision in *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*[2], was not authoritative as this Court had subsequently impliedly overruled that decision in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1], and the later decision of this Court in *M/s. Piyare Lal Adishwar Lal* v. *The Commissioner of Income-tax, Delhi*[3], was distinguishable. The High Court held that the case was governed by the ruling of this Court in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1], and accordingly decided the question of law against the assessee and in favour of the Income-tax Department.

On behalf of the assessee Mr. Gopalakrishnan put forward the argument that the High Court was in error in holding that the present case was governed by the decision of this Court in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1], that the remuneration earned by the managing director was not earned as a result of the utilisation of the joint family funds in the business and there was no detriment to the joint family assets or the use of the joint family assets in the business. It was not therefore a right proposition to state that under the principles of Hindu law the remuneration of the managing director in the present case was directly an accretion from the utilisation of the joint family funds and therefore constituted the income of the Hindu joint family. It was pointed out that in *Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1], the income of the managing director arose directly from the use of joint family funds, but the material facts in the present case are different. In our opinion, the argument of the appellant is well-founded and must be accepted as correct.

In *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1] one Rohatgi, manager of a Hindu undivided family, who took over a business as a going concern, promoted a company which was to take over the business. The articles of association of the company provided that Rohatgi would be the first managing director at a remuneration specified in the articles. The shares which stood in the name of Rohatgi and his brother were acquired with funds belonging to the joint family and the joint family was in enjoyment of the dividends paid on these shares, and the company was floated with funds provided by the family, and was at all material times financed by the family. In proceedings for assessment of the Hindu undivided family, it was claimed that the managing director's remuneration constituted the personal earnings of Rohatgi and could not be added to the income of the Hindu undivided family. The claim was rejected by this Court and it was held that the managing director's remuneration received by Rohatgi was, as between him and

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1. (1960) S.C.J. 311 : (1960) 1 M.L.J. (S.C.) 81: (1960) 1 An.W.R. (S.C.) 81: (1960) 1 S.C.R. 320: (1959) 37 I.T.R. 123: A.I.R. 1959 S.C. 1289.
2. (1950) 1 M.L.J. 443 ; (1950) 18 I.T.R. 194 ; A.I.R. 1950 Mad. 610.
3. (1960) 2 An.W.R. (S.C.) 111 : (1960) 2 M.L.J. (S.C.) 111 : (1960) S.C.J. 1282 : (1960) 3 S.C.R. 669 ; (1960) 40 I.T.R. 17: A.I.R. 1960 S.C. 997.

the Hindu undivided family, the income of the family and should be assessed in its hands. In other words, the Court held that there was a real and sufficient connection between the investment of the joint family funds and the appointment of Rohatgi as the managing director and hence the managing director's remuneration was, as between him and the Hindu undivided family, the income of the family and was taxable in its hands. That is the true *ratio decidendi* on the principle upon which the case was decided. At pages 331-332 of the Report S. R. Das, C. J. speaking for the Court set out the basis of the decision in the following passage :

> " The *kartha* was one of the promoters of the company which he floated with a view to take over the India Electric Works as a going concern. In anticipation of the incorporation of that company the *kartha* of the family took over the concern, carried it on and supplied the finance at all stages out of the joint family funds and the finding is that he never contributed anything out of his separate property, if he had any. The articles of association of the company provided for the appointment as managing director of the very person who, as the *kartha* of the family, had promoted the company. The acquisition of the business, the floatation of the company and appointment of the managing director appear to us to be inseparably linked together. The joint family assets were used for acquiring the concern and for financing it and in lieu of all that detriment to the joint family properties the joint family got not only the shares standing in the names of two members of the family but also, as part and parcel of the same scheme, the managing directorship of the company when incorporated ....The recitals in the agreement also clearly point to the fact of B. K. Rohatgi having been appointed managing director because of his being a promoter of the company and having actually taken over the concern of India Electric Works from Nilkhi Ram and others. The finding in this case is that the promotion of the company and the taking over of the concern and the financing of it were all done with the help of the joint family funds and the said B. K. Rohatgi did not contribute anything out of his personal funds, if any. In the circumstances, we are clearly of opinion that the managing director's remuneration received by B. K. Rohatgi was, as between him and the Hindu undivided family, the income of the latter and should be assessed in its hands."

Now, what are the facts found by the Appellate Tribunal in the present case ? In 1934, the joint family had acquired 90 shares out of the 300 shares of the company. The shares were acquired with the fun[illegible]s of the Hindu undivided family of which the father was the *kartha*. On the demis[illegible] of one of the directors, the assessee became a director in 1941 and on the death o[illegible]nother director who was managing the business the assessee became the mana[illegible] director with effect from 1942. It is apparent therefore that the joint family [illegible]ontrol only of 90 out of 300 shares and the shares were purchased in the or[illegible] course of business and not for the purpose of qualification of the *kartha* to [illegible]e a director. The shares were purchased in 1934, about 8 years before the *kartha* was appointed as the managing director. It is apparent that the shares were purchased by the joint family not with the object that the *kartha* should become the managing director but in the ordinary course of investment . To put it differently, there was no real connection between the investment of joint family funds in the purchase of the shares and the appointment of the *kartha* as managing director of the company. Applying the doctrine of Hindu law, the remuneration of the managing director was not earned by any detriment to the joint family assets. We are therefore of the opinion that the High Court was in error in holding that the present case falls within the principle of the decision of this Court in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[1]. On the contrary, we are of the opinion that the present case bears analogy to the decision of this Court in *M/s. Piyare Lal Adishwar Lal* v. *The Commissioner of Income-tax, Delhi.*[2] In that case, a member of a Hindu undivided family had furnished as security the properties of the family under an agreement whereby he was appointed treasurer of a bank. Remuneration received by the manager of the family for working as a treasurer was claimed to be income of the Hindu undivided family, because the properties of the family were furnished as security, but this claim was rejected by this Court on the ground that there was no detriment and risk to the joint family property and the emoluments of the treasurer could not be treated as an accretion to the income of the Hindu undivided family. We consider it also necessary to state that the

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1. (1960) S.C.J. 311 : (1960) 1 M.L.J. (S.C.) 81: (1960) 1 An.W.R. (S.C.) 81: (1960) 1 S.C.R. 320: (1959) 37 I.T.R. 123: A.I.R. 1959 S.C. 1289.

2. (1960) 2 An.W.R. (S.C.) 111 : (1960) 2 M.L.J. (S.C.) 111 : (1960) S.C.J. 1282 : (1960) 3 S.C.R. 669 : (1960) 40 I.T.R. 17 ; A.I.R. 1960 S.C. 997.

decision of Madras High Court in *Commissioner of Income-tax, Madras* v. *S.N.N. Sankaralinga Iyer*[1], was not impliedly overruled by this Court in *Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[2]. It was merely pointed out that the material facts of that case were different from those of *Kalu Babu Lal Chand's case.* It was, for instance, found in *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*[1], that the remuneration of the managing director was earned by rendering services to the bank and no part of the family funds were utilised except that the necessary shares to acquire the qualification of a managing director were purchased out of joint family funds. It was held that there was no detriment to the family property in any manner or to any extent. In view of this finding it follows that the remuneration of the managing director could not be treated as an accretion to the income of the joint family and taxed in its hands. The process of reasoning of the Madras High Court in *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*[1], may be open to criticism and may not be sound but, in our opinion, the actual decision in that case is correct and is supported by the principle that there is no detriment to the family property and no part of the family funds had been spent or utilised for acquiring the remuneration of the managing director. The facts in the present case are almost parallel to those in *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*[1], and there is no detriment to the joint family assets and no part of the joint family property was spent in earning the remuneration or making the acquisition. It therefore follows that the principle of the decision in *The Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[2], cannot be applied for deciding the question presented for determination in this case.

For these reasons we hold that the amounts of Rs. 9,000, Rs. 8,133 and Rs. 1,550 received by the assessee as managing director's remuneration, commission and sitting fees respectively are not assessable as income of the Hindu undivided family of which Palaniappa Chettiar is the karta. We accordingly allow this appeal, set aside the judgment of the High Court and answer the question in favour of the assessee and against the Income-tax Department. The appellant is entitled to costs here and in the High Court.

V.S. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH AND C. A. VAIDIALINGAM, JJ.

The Secretary, Home (Endowments) Department, Government of Andhra Pradesh and another .. *Appellants**

v.

Digyadarsan Rajendran Ram Dasjee Varu .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 53—*Math—Power of Assistant Commissioner to take steps for custody and protection of Math—When arises—Party succeeding to the office of trustee and in management—Jurisdiction to suspend under.*

Section 53 (1) contemplates four contingencies under which the Assistant Commissioner may take steps for the temporary custody and protection of the Math. In order to give jurisdiction to take action under the first contingency, the two conditions, namely; (1) a vacancy must have occurred in the office of the trustee of a math; and (2) there must be a dispute respecting the right of succession to such office will have to exist. That there must be an actual vacancy, unfilled, is clear from the wording of section 53 (1), when it deals with two different contingencies, providing for the assumption of management under

1. (1950) 1 M.L.J. 443: (1950) 18 I.T.R. 194: A.I.R. 1950 Mad. 610.
2. (1960) S.C.J. 311 : (1960) 1 M.L.J. (S.C.) 81 : (1960) 1 An.W.R. (S.C.) 81 : (1960) 1 S.C.R. 320 : A.I.R. 1959 S.C. 1289.

*C. A. No. 2586 of 1966 3rd May, 1967.

the first contingency, a vacancy should have occurred in the office of the trustee of a math, and there is a dispute in respect of the succession to such office. That is, the office has not been filled in, by anybody having a *prima facie* legal right to assume management. Similarly, the second contingency, contemplated under section 53 (1) when assumption of management can be made by department, is when a vacancy occurs in the office of a trustee of a Math and when such vacancy cannot be filled up immediately. This clearly shows that there must be a vacancy, as a fact, in the sense that nobody with any legal right has assumed office of the trustee of a Math.

Held on facts that there is no vacancy in the office of the trustee of the Math. *Held* further that once it is held that the respondent is not holding the office of the Mahant, exclusively on the basis of the order of the Government, it follows that the appellant has no jurisdiction to pass an order, placing the respondent under suspension, as that virtually amounts to a removal of the trustee of a Math. The removal of a trustee of a Math can be done only in the manner, and in the circumstances, mentioned in section 52 of the Act. Therefore the order of the Government, placing the respondent under suspension, is not valid.

Appeal from the Judgment dated the 17th November, 1966 of the Andhra Pradesh High Court in Writ Petition No. 1589 of 1965.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate with him), for Appellants.

V. Rangacharya, B. Parthasarathy and *P. C. Bhartari*, Advocates of *M/s. J. B. Dadachanji & Co.* for Respondent.

The Judgment of the Court was delivered by

Vaidialingam, J.—This appeal, by certificate, is directed against the order of the Andhra Pradesh High Court, allowing a writ petition, filed by the respondent, under Article 226 of the Constitution.

The facts leading up to the filing of the Writ Petition by the respondent, may be briefly indicated. In respect of Sri Swami Hathiramji Math, Tirumalai, Tirupati, disputes arose regarding the succession to the office of the Mahant of the Math, after the death, in 1947, of the then Mahant, Prayag Dossji. An agreement seems to have been arrived at, on 29th October, 1947, laying down the procedure for choosing a successor to the office of the Mahant, when a vacancy arises. The Akada Panchayat appears to have been constituted the Supreme authority, in such matters. That agreement also provided, as to who among the respondent, and one Chetam Doss, was to succeed to the office of the Mahant, on the death of one Narayan Doss. Narayan Doss died on 9th December, 1958, and Chetam Doss succeeded as Mahant. The respondent filed O.S. No. 84 of 1958, in the Subordinate Judge's Court, Chittoor, for a declaration that he is entitled to succeed to the office of Mahant. The suit was resisted, by Chetam Doss, on the basis that under the agreement of 29th October, 1947, he was legitimately entitled to succeed as Mahant. Sometime later, the respondent and Chetam Doss, entered into a compromise, by virtue of an agreement, dated 15th July, 1961. Both of them agreed that Chatam Doss was entitled to continue as Mahant, and that after his death, the respondent was to succeed as Mahant. In view of this agreement, the respondent got dismissed, as settled, O.S. No. 84 of 1958.

Chetam Doss died, on 18th March, 1962, and the respondent claims to have succeeded as Mahant, in his own right. But, according to the appellant, the Commissioner, H. R. & C. E., Andhra Pradesh, received telegram stating that there was a dispute about the person who was to succeed as Mahant. The Assistant Commissioner, Hindu Religious and Charitable Endowments, took action, under section 53 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) (hereinafter called the Act), which is applicable to the State of Andhra Pradesh, and assumed charge, on 24th March, 1962, of the Math and its properties. The respondent filed, on 26th March, 1962, O.S. No. 24 of 1962, for a declaration that

he is the rightful successor to the office of the Mahant of the Institution, in question. The Commissioner, Hindu Religious and Charitable Endowments was made a party to the suit. The respondent also filed a revision, before the Government, on 18th April, 1962, challenging the assuming charge of the Math, under section 53 of the Act, by the Assistant Commissioner. The Government stayed further proceedings; and, in consequence, O.S. No. 24 of 1962, was withdrawn, by the respondent, on 24th April, 1962. The Government also passed an order, on 5th June, 1962, stating that it was necessary to take action, for making suitable arrangements for the proper administration of the Math and its endowments, till the civil Court decided as to who should succeed to the office of the Mahant. In this connection, the State Government referred to an objection, received, from one Devendra Doss, stating that he is the proper person entitled to succeed to the office of the Mahant. Ultimately, by the said order, the Government appointed the respondent, as an interim Mahant, subject to the various conditions, laid down therein. Devendra Doss filed Writ Petition No. 602 of 1962, on 21st June, 1962, in the High Court, challenging this order of the State Government, dated 5th June, 1962. That writ petition was dismissed on 27th August, 1962. In the meanwhile, Devendra Doss, who was a minor, had instituted two suits, O.S. Nos. 50 of 1962 and 57 of 1962, to declare him as the person entitled to succeed to the office of the Mahant on the death of Chetam Doss. In the first suit he was represented, by one Mukund Doss, as next friend, and in the second suit he was represented by one Bhagwant Doss, as the next friend. When Devendra Doss attained majority, later on he preferred to continue O.S. No. 50 of 1962, and therefore O.S. No. 57 of 1962 was dismissed, as unnecessary.

On 22nd August, 1964, the Government passed an order, directing the respondent to show cause why its previous order, dated 5th June, 1962, appointing the respondent, as interim Mahant, should not be cancelled. This appears to have been issued, by the State Government, in view of the fact that the respondent was taking a particular attitude regarding the *pada kanikkas* received by him. In the said order, the Government also proceeded, on the basis that it has no jurisdiction to appoint an interim Mahant when action is taken, under section 53 of the Act.

On receipt of this notice, the respondent filed Writ Petition No. 1534 of 1964, challenging the said order. His claim appears to have been that he had succeeded to the office of Mahant, in his own right, after the death of Chetam Doss, and that no action can be taken, under section 53 of the Act, and therefore, the question of the Government, either appointing him as interim Mahant, or taking any action to cancel such an order, does not arise. It is seen that further proceedings, in pursuance of the notice, issued by the Government, were stayed by the High Court, pending the disposal of the writ petition. The State Government passed an order, on 9th September, 1965, framing certain charges, as against the respondent, and directing him to furnish his explanation, regarding the same, and, at the same time, placed him under suspension. The respondent filed, Writ Petition No. 1589 of 1965, challenging this order of the Government, placing him under suspension. In view of this writ petition, the earlier Writ Petition No. 1534 of 1964, was dismissed, as infructuous, on 14th April, 1966.

In the meanwhile, Bhagwant Doss, who had originally instituted O.S. No. 57 of 1962, as the next friend of Devendra Doss, and which suit was got dismissed by the minor, after attaining majority, instituted another suit, O.S. No. 69 of 1965 on 29th September, 1965, claiming in his own right to be the person entitled to succeed to the office of Mahant. This suit appears to be still pending. But O.S. No. 50 of 1962, which was decided to be continued, by Devendra Doss, was contested by the respondent and, ultimately, dismissed, on 28th April, 1966. It is stated that an appeal A.S. No. 476 of 1966, has been filed, on 17th November, 1966, against this decree, and, it is still pending.

The main contention, taken by the respondent, in Writ Petition No. 1589 of 1965, was that he had already in law succeeded as Mahant, on 18th March, 1962, when the presiding Mahant, Chetam Doss, died. Therefore, according to him, there was no vacancy which can be said to have occurred, in the office of the trustee of the

Math, so as to give jurisdiction to the Assistant Commissioner, or the Commissioner, Hindu Religious and Charitable Endowments, to take action, under section 53 of the Act. The respondent also relied upon the circumstance that the suit filed by Devendra Doss, O.S. No. 50 of 1962, had been dismissed and the Court had accepted his title to hold the office of the Mahant, on the basis of the Panchayat Agreement, dated 29th October, 1947, as well as the agreement, dated 15th July, 1961, entered into between him and the then Mahant, Chetam Doss. The respondent also relied upon the circumstance that his assumption of office, as Mahant, on the death of Chetam Doss, has been approved, on 18th March, 1962, by the supreme authority, namely, the Akada Panchayat.

The appellant resisted the claim of the respondent, on the ground that when Chetam Doss died, and the respondent attempted to take charge as Mahant, a claim was made, by one Devendra Doss, that he was the person, lawfully entitled to succeed to the office of the Mahant. On the death of Chetam Doss on 18th March, 1962 a vacancy occurred in the office of the trustee of the Math, and there is also a dispute between the respondent and Devendra Doss regarding the right of succession to such office. In view of the fact that the necessary conditions for invoking section 53 exist, the assumption of management of the Math was taken over, by the Assistant Commissioner, Hindu Religious and Charitable Endowments for the proper management of the institution. It was also pointed out that the suit instituted, by Bhagwant Doss, O.S. No. 69 of 1965, claiming in himself the right to succeed, as a trustee, was still pending and that also shows there is a dispute, regarding succession to the office of the trustee. The appellant has also urged, that in any event, inasmuch as the respondent has been appointed, to manage the institution, by the department, under section 53 of the Act, and, as he was continuing in such management by virtue of such appointment, the State had ample jurisdiction to pass orders either of suspending, or even dismissing the respondent.

The learned Judges of the High Court have held that the respondent has succeeded as Mahant, on 18th March, 1962, on the death of Chetam Doss by virtue of the Panchayat Agreement, of 29th October, 1947, and the compromise agreement, dated 15th July, 1961. Therefore, it cannot be said that there was any vacancy in the office of the trustee of the Math, so as to enable the appellant to take action, under section 53 of the Act. The High Court has in this connection, referred to the findings recorded, by the Subordinate Judge's Court, in favour of the respondent, in O.S. No. 50 of 1962. The mere circumstance that after a person has succeeded to the office of the trustee, other people lay claims to that office, and institute litigation for that purpose, will not, according to the High Court, give jurisdiction to the appellants to take action, under section 53 of the Act. The High Court is further of the view that the appellant's action, in placing the respondent under suspension, is contrary to the directions given by the High Court, on 9th April, 1965, pending the disposal of the writ petition. The High Court is further of the view that the stand taken by the appellants, is quite contrary to the earlier stand, taken in their order, dated 5th June, 1962, wherein they had categorically stated that the civil Court's decision will be conclusive and final, regarding the succession to the office of the Mahant. This reason is given by the High Court, as it was of the view that the appellant should give due respect to the decision, in O.S. No. 50 of 1962. On these grounds, the High Court quashed the order passed, by the State Government, dated 9th September, 1966, placing the petitioner, under suspension.

Mr. Ram Reddy, learned Counsel appearing for the appellants, has raised the same contentions that were taken, before the High Court. In addition, Counsel has also pointed out that the decision, in O.S. No. 50 of 1962, has not become final, inasmuch as Devendra Doss, who lost that litigation, has filed A.S. No. 476 of 1966, which is still pending. Counsel further points out that, in view of the dispute raised, by Devendra Doss, by making a claim for the trusteeship of the Math, before the Government, the Writ Petition No. 602 of 1962, filed by the said party, as well as the various suits, referred to above, will clearly show that there is a dispute regarding the succession to the office of the trustee of the Math, when a vacancy occurred;

on the death of Chetam Dass, on 18th March, 1962. Therefore, action taken by the appellant, in the interests of the institution, was perfectly valid. Counsel also urged that inasmuch as the respondent is functioning as Manager of the institution, by virtue of his appointment, on 5th June, 1962, by the Government, subject to the conditions mentioned therein, the Government was competent to take disciplinary action, as against the respondent, for breach of those conditions.

Mr. V. Rangacharya, learned Counsel for the respondent, fully supports the reasons, given by the learned Judges of the High Court, for accepting the claim made by his client, in the writ petition.

The short question, that arises, for consideration, is as to whether the Assistant Commissioner, Hindu Religious and Charitable Endowments had jurisdiction to assume management of the Math, in question, under section 53 of the Act. That will depend on the further question as to whether the State Government had jurisdiction to place the respondent, under suspension, as they have purported to do, by their order, dated 9th September, 1965. The answer to the above question is to be decided, by reference to section 53 of the Act. Section 52 of the Act, occurs in Chapter IV, relating to Maths. Sub-section (1) of that section, enables the Commissioner or any two or more persons, having interest and having obtained the consent, in writing, of the Commissioner, to institute a suit, to obtain a decree for removing the trustee of a math or a specific endowment attached to a math, for any one or more of the grounds mentioned, in clauses (*a*) to (*f*), therein. Section 53, which is the material section, and which relates to filling of vacancies is as follows :

> "53. (1) When a vacancy occurs in the office of the trustee of a math or specific endowment attached to a math and there is a dispute respecting the right of succession to such office, or,
>
> when such vacancy cannot be filled up immediately, or
>
> when the trustee is a minor and has no guardian fit and willing to act as such or there is a dispute respecting the person who is entitled to act as guardian, or
>
> when the trustee is by reason of unsoundness of mind or other mental or physical defect or infirmity unable to discharge the functions of the trustee,
>
> the Assistant Commissioner may take such steps and pass such order as he thinks proper for the temporary custody and protection of the endowments of the math or of the specific endowment, as the case may be, and shall report the matter forthwith to the Commissioner.
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> (2) Upon the receipt of such report, if the Commissioner, after making such inquiry as he deems necessary, is satisfied that an arrangement for the administration of the math and its endowments or of the specific endowment, as the case may be, is necessary, he shall make such arrangement as he thinks fit until the disability of the trustee ceases or another trustee succeeds to the office, as the case may be.
>
> (3) In making any such arrangement, the Commissioner shall have due regard to the claims of the disciples of the math, if any.
>
> (4) Nothing in this section shall be deemed to affect anything contained in the Madras Court of Wards Act, 1902."

Section 53 (1) contemplates four contingencies, under which the Assistant Commissioner may take steps for the temporary custody and protection of the math. We are concerned, in this case, only with the first contingency, referred to in that sub-section. Before that provision can be invoked, two conditions are necessary, *viz.* (*a*) a vacancy must have occurred, in the office of the trustee of a math ; and (*b*) there must be a dispute, respecting the right of succession to such office. In this case, it is possible to say, in view of the claim made by Devendra Dass, and the litigations referred to, above, that there was a dispute respecting the right of succession to the office of the Mahant. But, in order to give jurisdiction to the appellant to take action, under the first contingency, referred to in sub-section (1) of section 53, the

two conditions adverted to above, will have to exist. In this case, it is the claim of the appellant that there was a vacancy, in the office of the trustee of the Math, on 18th March, 1962, when Chetam Doss died. On the other hand, according to the respondent, there was no vacancy in the office of the Mahant, at that time, because, on the death of Chetam Doss, the respondent succeeded to the office of the Mahant. Therefore, the point to be considered is, as to whether a vacancy has occurred, in the office of the trustee of the Math, on 18th March, 1962. That there must be an actual vacancy, un-filled, is clear, from the wording of section 53 (1), when it deals with two different contingencies, providing for the assumption of management. Under the first contingency, a vacancy should have occurred in the office of a trustee of a Math, and there is a dispue in respect of the succession to such office. That is, the office has not been filled in, by anybody having a *prima facie* legal right to assume management. Similarly, the second contingency, contemplated under section 53 (1), when assumption of management can be made by the Department, is when a vacancy occurs in the office of a trustee of a Math and when such vacancy cannot filled up immediately. This clearly shows that there must be a vacancy, as a fact, in the sense that nobody with any legal right has assumed office of the trustee of a Math.

In this case, as we have pointed out earlier, the High Court has accepted the claim of the respondent that by virtue of the Panchayat Agreement dated 29th October, 1947, and the compromise agreement, dated 15th July, 1961, the respondent has succeeded to the office of the trustee of the Math, on 18th March, 1962, on the death of Chetam Doss. The supreme authority, according to the High Court, the Akada Panchayat, has also approved of the said appointment, by resolution of the same date. We do not propose to consider the findings recorded in O.S. No.50 of 1962, which are no doubt in favour of the respondent, because that decision is the subject of an appeal, in A.S. No. 476 of 1966. Nor do we propose to consider the claim of Bhagwan Doss, in O.S. No.69 of 1965, which is still pending adjudication, at the hands of the Court. But even without reference to those litigations, the view of the High Court that there is no vacancy in the office of the trustee of the Math which alone will give jurisdiction to the appellant to take action under section 53 (1), can be accepted as correct, for the other reasons, mentioed by us earlier.

Mr. Ram Reddy, learned Counsel for the appellants, further points out that, in this case, the respondent is in management of the Math, by virtue of the appointment made, by the State Government, on 5th June, 1962, and therefore the State Government is entitled to take disciplinary action against him for breach of condition, under which he was holding that office. Counsel also invited our attention to the averments made by the respondent himself, in Writ Petition No. 602 of 1962, that the State Government has appointed him as interim Mahant. The stand taken, by the respondent, in Writ Petition No. 602 of 1962, cannot assist the appellant, because he was interested then in fighting the claim made by Devendra Doss, in the said writ petition. In resisting such claim, he has, no doubt, made reference to the fact that his right to function, as Mahant, cannot be disturbed, as the State Government has appointed him as interim Mahant. Therefore, the stand taken by the respondent, in the said writ petition, must be understood in the said context.

No doubt, normally, if it is established that the respondent's only right to function as Manager of this institution, is exclusively on the basis of the Government order, dated 5th June, 1962, there will be considerable force in the contention of the learned Counsel for the appellant that the State Government has got jurisdiction to take disciplinary action, against the respondent. But the facts in this case show that the position is entirely different. If the respondent, as held by the High Court—with which view we are in agreement—has succeeded to the office of the trustee of the Math, on the death of Chetam Dass, on 18th March, 1962, in his own right, the mere circumstance that the Government also passes an order appointing him as interim Mahant, or Manager, later, will not take away the right of the respondent to function as trustee, on the basis of his original right. Once it is held that respondent is not holding the office of the Mahant, exclusively on the basis of the order of the Government, dated 5th June, 1962, it follows that the appellant has no jurisdiction

to pass an order, placing the respondent under suspension, as that virtually amounts to a removal of the trustee of a Math. The removal of a trustee of a Math can be done only in the manner, and in the circumstances, mentioned in section 52 of the Act. Therefore, the view of the High Court that the order of the Government placing the respondent under suspension, is not valid, is correct.

The result, is, that the appeal fails, and is dismissed. In the circumstances of the case, there will be no order as to costs.

S.V.J. — *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—MR. K. N. WANCHOO, *Chief Justice* AND G. K. MITTER, J.

The Andhra Prabha Ltd. and another .. *Appellants**

v.

The Secretary, Madras Union of Journalists and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 25-*F*, 25-*FF*, 25-*FFF* (1)—*Newspaper Publishing Company E. N. (P) Ltd—Dailies and Periodicals published from Madras in three different languages—Transfer of rights to new companies—Effect—Publication of all papers and periodicals ceasing on 28th April,* 1959—*Some persons retained to take care of valuable equipment and properties—Failure to inform Provident Fund authorities—Only an omission—Teleprinters, paid for upto to a later date and user by the new companies—New Companies getting help from the directors of E. N. (P) Ltd.,—No inference that they are benamidars possible.*

Industrial dispute—Transferee company undertaking to take over all employees of the transferor company—Conditions of service same—No break in service—Employees protesting against transfer and launching a strike—Strike illegal—Closure by management not a lockout.

A Private Limited Company E. N. (P) Ltd., owned and published newspapers and periodicals in 3 languages from Madras—English, Tamil and Telugu. The chairman of the Company R. G. was also a director of a private Company which owned and controlled a press and paper at Delhi.

It was resolved by the Board of Directors of E. N. (P) Ltd., on 11th April, 1959, that it should cease to carry on business as proprietors of the various newspapers and to sell away its various publications at different centres as also to sell, hire or otherwise dispose of its printing plants machinery and equipment and also license or lease out its premises at various places. In pursuance thereof an agreement was entered into between E. N. (P) Ltd., and Andhra Prabha (P) Ltd., Vijayawada that E. N. P. Ltd., would sell and A. P. Ltd., would purchase as a going concern the proprietary rights of printing and publishing the Telugu daily and Illustrated Weekly etc. The employees of E. N. Ltd., got scent of the same and protested against the proposal to shift to Vijayawada. On completion of the transaction the Action Committee of the Employees were informed that the management had sold the rights of editing, printing and publishing the Andhra Prabha daily and Illustrated Weekly edition to a new company Andhra Prabha (P) Ltd., Vijayawada which company has agreed to take over all employees employed at the time of taking over without any break in the continuity of service and on the same terms and conditions as before.

It is alleged by the management that acts of sabotae and indiscipline were committed on 26th April. The strike of the workers started at 4-30 P.M. on 27th April and publication of all papers was stopped. Notice to the above effect was given for publication in the Hindu and the whole of the above facts were published on the 29th April. It was also stated therein that because of the closure of publication of the papers the services of the workman and working Journalists were

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* C.A. Nos. 1078 and 1079 of 1965 and 9 of 1966. 4th May, 1967.

dispensed with and any amounts due to them under section 25-F of the Industrial Disputes Act would be paid to them—Rs. 7 lakhs so due was paid later.

The Industrial dispute thus raised was decided by a special tribunal which found that R. G. the chairman of E. N. Ltd., did not given any verbal assurance in 1958 that no part of the business would be shifted elsewhere, that there was a lockout and a closure resulted only in October, November, 1959.

The questions arising for decision in the appeal are the said two points and the contention of the employees that the new companies were only benamidars of E. N. Ltd.

Held, on facts, no verbal assurance was given by R. G. the chairman of E. N. (P) Ltd., that no part of the business will be shifted elsewhere as held by the Appellate Tribunal).

In industrial law, a new company which is an independent legal entity cannot be called a benamidar for another older organisation because there was in both companies a person or family of persons who could guide the destinies of the two new companies.

Where the ownership or management of an undertaking is transferred whether by agreement or operation of law from the employer to a new employer every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation under section 25-F of the Act as if he was retrenched ; but it will not apply to a workman if his service is not interrupted and the terms and conditions of service after transfer is not in any way less favourable than before. In the instant case it was provided in the transfer agreement that all the employees would be absorbed and those unwilling to go to Vijayawada would be paid by E.N. (P) Ltd., the amounts due under section 25-F.

Where an undertaking is closed down for any reason whatever, every workman who has put in one year's continuous service shall be entitled under section 25-FFF (1) to notice and compensation in accordance with the provisions of section 25-F.

To all intents and purposes the business of the Company was closed from 29th April, 1959 ; whatever might have been the motive behind the closure it was an effective one from April, 1959. and there is no reason to hold (with the Tribunal) that the closure became effective only in November, 1959.

The fact that some employees, of whom a reporter was one, were retained to take care of valuable equipments cannot lead to the inference that it did not close down, but could take over whenever it wanted to. The failure to inform Provident Fund Authorities, the teleprinter service—which had been paid for upto a certain date—was in use till October, 1959, would not either by themselves or taken in conjunction with other circumstances justify the conclusion that they were for the use of E. N. (P) Ltd., if necessary.

The closure cannot also be held an assumed one. The strike by the employees in the circumstances was not justified and the management was entitled to close down on 29th April, 1959.

Appeals by Special Leave from the Award, dated the 31st July, 1963 of the Special Industrial Tribunal, Madras in Industrial Dispute No. 1 of 1962.

N. C. Chatterjee, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Appellants (In C.As. Nos. 1078 and 1079 of 1965) and the Respondents (In C.A. No. 9 of 1966).

S. Mohan Kumaramangalam, Senior Advocate (*M. K. Ramamurthi, Mrs. Shyamala Pappu, M/s. Nagarathnam* and *Madan Mohan*, Advocates, with him), for Appellant (In C.A. No. 9 of 1966) and Respondents Nos. 1 and 2 (In C.As. Nos. 1078 and 1079 of 1965).

R. Thiagarajan, Advocate, for Respondent No. 3 (In C.A. No. 9 of 1966).

The Judgment of the Court was delivered by

Mitter, J.—These are three appeals from an award, dated 31st July, 1963, made by the Special Industrial Tribunal, Madras. At the time when the reference was made, the parties to this dispute were on the one hand, the workers and the staff and the working journalists employed under the Express Newspapers (P.) Ltd. and on the other hand, the private limited company called the Express Newspapers (P.) Ltd. The latter, hereinafter referred to as the Company, owned and published newspapers, and periodicals from Madras. These may be split into three groups. The first group comprised of the Indian Express (Daily), Sunday Standard (Weekly) and Screen (Weekly); all these were published in English. The second group consisted of Andhra Prabha (Daily) and the Andhra Prabha Illustrated Weekly (Weekly): these were published in Telugu language. The third group consisted of two papers, Dinamani (Daily) and Dinamani Kadir (Weekly); these were in Tamil language. One Ramnath Goenka was the Chairman of the Board of Directors of the company incorporated in 1946. He was also one of the directors of Express Newspapers Ltd. which owned and controlled a press and paper at Delhi The group of newspapers at Madras does not seem to have prospered much before 1956. It started making sizable profits from that year.

The reference which was made by the Government of Madras on 30th April, 1959 under section 10 (1) (*d*) of the Industrial Disputes Act contained two questions:

"(1) Whether the transfer of the publication of "Andhra Prabha" and "Andhra Prabha Illustrated Weekly" to "Andhra Prabha (P.), Ltd.," in Vijayawada is justified and to what relief the workers and the working journalists are entitled ?

(2) Whether the strike of the workers and working journalists from 27th April, 1959 and the consequent lockout by the Management of the Express Newspapers (P.), Ltd., are justified and to what relief the workers are entitled ?"

This was later transferred by an order dated 3rd November, 1962 to the Special Industrial Tribunal which has made the award. Before that date however the matter had come up to this Court in appeal from Writ Petitions filed in the Madras High Court on the 1st May, 1959 and 5th May, 1959 challenging the validity of the order made under section 10 (3) and the jurisdiction of the Industrial Tribunal to adjudicate upon the dispute on the ground that there was no lockout but a closure of the company's business. This Court in the *Management of Express Newspapers Ltd.* v. *Workers and Staff*[1], held that the preliminary enquiry as to jurisdiction should be made by the Industrial Tribunal itself taking into account all facts which are relevant and material.

On the application of the workmen for addition of parties, the Andhra Prabha Ltd., the Indian Express Newspapers (Madurai), Ltd., and the Express Newspapers Ltd., a public company were added as parties before the Special Tribunal.

As the dispute which the Special Tribunal had to adjudicate upon was not the first of the kind between the company and its workers, it is necessary to take note of a few facts which are to be found in the judgment of this Court, dated 2nd August, 1962 mentioned above. This narration, according to the Court in the former judgment, forms the background of the present dispute between the parties. In March, 1957, a dispute arose between the parties on certain points including bonus. This was referred for industrial adjudication ending in an award in 1957. In March, 1958 the company notified its intention to retrench 69 workmen and this led to another dispute which was referred for adjudication. The unions made certain complaints to the State Government which led to the intervention by the Home Minister of the State but without any success. On 30th October, 1958 the company gave notice to the workmen and working journalists that it was going to close down its business at Madras with effect from 1st December, 1958 on the allegation *inter alia* that there were persistent labour troubles and indiscipline on the

1. (1963) 3 S.C.R. 540.

part of labour. The Home Minister again intervened and this time with success. On 6th November, 1958 a settlement was arrived at between the Management and the employees and journalists in the presence of the Labour Commissioner of Madras. The terms of agreement were reduced into writing and the only ones which may be noted are:

> "(1) All the employees retrenched on 30th April, 1958 would be reinstated with continuity of service.
>
> * * * * * *
>
> (10) In view of the settlement the Management would withdraw the notice of closure and announce the same on the notice board.

The settlement was to be operative for 2½ years. According to the workers, Mr. Goenka gave an assurance on 6th November, 1958 that he would not shift the publication of any of the papers mentioned from Madras to Vijayawada during the said period.

On the former occasion, when the matter was before this Court reference was made to this assurance and this Court held that this was a subject which the Industrial Court would have to go into. According to the management it was felt in November, 1958 that the Telugu papers should be published from Vijayawada, an additional consideration for the same being the suggestion of the Press Commission in regard to the diffusion of control of newspapers. Leaving out of consideration the intention of Ramnath Goenka at or about that time, we may proceed to note the events which followed thereafter. On 17th January, 1959 notice was given of an extraordinary general meeting of the shareholders of the company to consider certain resolutions. The meeting was actually held on 11th February, 1959 and one of the resolutions passed was that the company should cease to carry on business as proprietors of various newspapers and that in pursuance thereof the company would close or transfer and sell its various publications at Bombay, Madras, Madurai and Delhi to other parties and sell, hire out or otherwise dispose of its printing plant and machinery and equipment and also license or lease out its premises at various places. Another resolution authorised the directors to take all steps necessary for the closing or sale and transfer of various publications as they may think fit and at such prices and on such terms as they might consider best. The workers must have got a scent of this and the Secretary of the Express Newspapers Employees' Union (hereinafter referred to as the Secretary) addressed a letter to the Chairman of the company on 31st March, 1959 to the effect that the employees had come to learn that four units of the rotary machine at Madras had been dismantled and removed to Vijayawada with a view to starting an edition of the Andhra Prabha there. Reference was also made to the assurance alleged to have been given before the Home Minister to drop the proposal to shift the Andhra Prabha and a discussion with the addressee was asked for. It appears that there was a reply to this letter on 2nd April, which is however not included in the record. On 13th April, 1959 the Board of Directors of the company passed certain resolutions. One of them was that the company would sell and transfer and the Indian Express (Madurai) (P.), Ltd. would purchase as a going concern the proprietary rights of printing and publishing the Madurai edition of the English Daily newspaper known as the Indian Express, the Madurai Edition of the English Weekly known as the Sunday Standard and the Madurai edition of the Tamil Daily known as Dinamani (inclusive of the Sunday edition). Another resolution passed was to the effect that the company would sell and the Andhra Prabha (P.), Ltd. Vijayawada would purchase as a going concern the proprietary rights of printing and publishing Andhra Prabha and Andhra Prabha Illustrated Weekly together with the option to purchase from the company the right to print, edit and publish the English newspaper known as the Sunday Standard for circulation in the State of Andhra Pradesh only on terms and conditions set out in the draft agreement. A third resolution was to the effect that the company would sell to the Andhra Prabha (P), Ltd. Vijayawada the items of machinery set out in the schedule to the draft agreement for a price of Rs. 1,75,000 on the terms set out in the draft agreement. On 15th April, 1959 an agreement

was actually entered into between the company and the Andhra Prabha (P), Ltd. to the effect that the vendor had agreed to sell and the purchaser had agreed to buy the goods set out in the schedule thereto as soon as convenient and the price payable would be Rs. 1,75,000 within one week of the purchaser getting the machinery. On 20th April, 1959, the General Secretary of the Madras Union of Journalists wrote to the Director of the company complaining that the writer had not heard in regard to the issue raised in the letter of 31st March. The letter proceeded to record that the journalists had not been told exactly what the Management proposed to do but they had heard that a new company called the Andhra Prabha (P.), Ltd. had been registered at Vijayawada and arrangements were being made to split up the other two Madras Papers, namely, the Indian Express and Dinamani into two separate companies. According to the writer, this had created a state of tension. On the same day, the Madras Union of Journalists at a meeting passed a resolution condemning the action of the Management in announcing and effecting the sale of the Andhra Prabha Daily and the Andhra Prabha Illustrated Weekly to a new company at Vijayawada which had been done surreptitiously; and as a result thereof all the employees concerned might not be absorbed by the new company. A complaint was also made that the sale was really benami and a threat was held out that unless the Management desisted from the course of *mala fide* closure and break-up of the Madras establishment and purported sales to benami companies the employees would be compelled to go on strike as and from a date to be fixed by the joint action committee set up under the resolution." On 21st April, a letter was sent to the Director of the company from the Convener, Joint Action Committee in which it was said that unless a satisfactory reply was sent regarding the matters mentioned in the resolution within 72 hours, the Joint Action Committee would be compelled to carry out the mandate of the workers calling for a strike.

On 22nd April, 1959 there was an agreement in writing between Andhra Prabha (P.), Ltd. and the company to the effect that the first named company had agreed to purchase and the company had agreed to sell as a going concern the proprietary rights as editors, proprietors etc. of the Andhra Prabha (Telugu daily) and the Andhra Prabha Illustrated Weekly together with the option to purchase from the vendor the right to print, edit and publish the English newspapers, the Indian Express and the English Weekly, the Sunday Standard. The consideration for the sale of the proprietary rights in Andhra Prabha and Andhra Prabha Illustrated Weekly was fixed at Rs. 25,000. Clause 11 of the agreement provided that:

"all employees now employed by the vendor in connection with the aforesaid two publications shall be taken over into the service of the purchaser company as and from the taking over date."

Clause 12 provided that the transfer of the two undertakings would be on the terms that every workman and employee who had been in continuous service for not less than one year in the said undertaking of the vendor immediately before the taking over date would be taken over by the purchaser as and from such date on the terms and conditions that the services of the workmen and the employees had not been and would not be deemed to be interrupted by such transfer and the terms and conditions applicable to the workmen and the employees after such transfer would not in any way be less favourable to them than those applicable before the transfer and the purchaser would be legally liable to pay the workmen and employees, in the event of retrenchment, compensation on the basis that his or their services had been continuous and uninterrupted by such transfer. On 23rd April, 1959 the Director of the company wrote a letter to the Joint Action Committee to the effect that the Management had sold their right of editing, publishing, etc., the Andhra Prabha Daily and the Andhra Prabha Illustrated Weekly to a new company in Vijayawada assigning the reason therefor that it was in the interest of the Telugu-speaking people that it should be produced and published from a Telugu centre. The terms and conditions with regard to the absorption by the new company of all staff and workers connected with the business of the two newspapers were also mentioned therein.

Lastly, it was said that with regard to such of the staff as were not willing to go to Vijayawada their services with the company would be terminated as the company had no work to offer to them but they would be paid all their dues. On 24th April, 1959, the Convener, Joint Action Committee, characterised the Director's reply of the 23rd as highly unsatisfactory and stated that a resolution had been adopted to the effect that the workers would go on strike at any time after the expiry of 24 hours. On the next day the Director informed the Union that the contemplated strike would be illegal and unjustified. On 27th April, the Convener wrote to the Director stating that the Management had rejected their demand to maintain the *status quo* regarding the publication of the three newspapers from Madras, specially Andhra Prabha. In addition false charges of sabotage and threats and arrest had been made and consequently the workers were compelled to give effect to the decision of 24th April, *i.e.*, to go on strike. The watch and ward staff were however instructed to stay on duty.

It is necessary to note at this stage that according to the Management some act of sabotage and gross indiscipline were committed on 26th April, 1959, namely, the mutilation and destruction of one full page and two gallies of Dinamani matter and removal of switch keys from three motor cars left in front of the office building. According to the statement of Ramanath Goenka before the Tribunal:

> "During the whole of the 28th of April, the labourers demonstrated before the office and prevented ingress and egress of staff members from the office building. *****I then decided to close down and issued a statement through the Hindu informing every one of this."

A notice to the above effect was published on the notice board of the company on the 27th and a copy of it was sent by the Director to the Convener.

The strike of the workers started at 4-30 P.M. on 27th April, and publication of all papers was stopped. Notice to the above effect was given in the Hindu regarding the Indian Express, Dinamani and Andhra Prabha. On the 29th of April, the closure notice was published in the Hindu in which it was mentioned that the Management had intimated the workers by letter dated 23rd April that they had sold their right of editing, printing and publishing Andhra Prabha and Andhra Prabha Illustrated Weekly to the Vijayawada company. The substance of the agreement between the two companies with regard to the workers was also mentioned in this notice. The workers had been notified that the Management had decided to close with immediate effect the undertaking and publication of all the seven newspapers at Madras and to dispense with the services of the workmen and the working journalists. Notice was also given that they would be paid their wages for the period during which they had worked besides one month's salary in lieu of notice prescribed under section 25-F and compensation as laid down under the Act. Such compensation amounting to one of Rs. 7 lakhs was actually paid later on.

On the 30th April the Management informed the Commissioner of Police with regard to the devlopments and published another notice in the Hindu regarding the closure stating that most of the machinery had already been sold for cash and the building of the company advertised for rent. On the same day, the Madras Government issued a notice under section 10 (3) of the Industrial Disputes Act prohibiting the continuance of the strike and the lockout. This was followed by the two writ petitions in the Madras High Court already mentioned.

After the matter was decided by this Court in August, 1962, the adjudication was taken up by the Special Industrial Tribunal before which some witnesses including Ramnath Goenka were examined and a large number of documents tendered in evidence. The central question with regard to the first issue was, whether Ramnath Goenka had given a verbal assurance in November, 1958, that there would be no shifting of the venue of the publication of any of the papers from Madras to Vijayawada for $2\frac{1}{2}$ years. The Tribunal scrutinised the evidence both oral and documentary in great detail and observed that it was not satisfied that Ramnath Goenka had given any verbal assurance imputed to him. The Tribunal further held

that an assurance of the nature could not be inferred from the circumstances of the case with the result that the first part of the first issue was answered in the affirmative with the necessary consequence that the workers could not be held entitled to any relief because of the transfer of these two publications.

Of the three appeals, the first two are by the Andhra Prabha, Ltd. and Indian Express Newspapers (Madurai), Ltd. and the second by the public company styled the Express Newspapers Ltd., while the third appeal is by the employees of the Express Newspapers Ltd., against its Management.

No attempt was made before us to show that the Tribunal's conclusion about the absence of the verbal assurance or the inference to be drawn in respect thereof from the circumstances was wrong. The substance of the argument on behalf of the employees was that there was really no closure but the transfer was in effect from a parent company to daughter companies and in this connection reliance was placed on the judgment of this Court in *Kays Construction Co.* v. *Its Workers*[1], and the earlier decision in *Workmen* v. *Dahingeapara Tea Estate*[2]. In the *Kay's Construction Co.'s case*[1] a private limited company was incorporated to continue and carry on the business activities of a proprietary concern. The former proprietor, his wife and the manager employed in the former business were three out of five diectors of the new company. The dispute in regard to the refusal by the new company to continue some former employees in service was referred for adjudication to an industrial tribunal. It was contended on behalf of the workmen that the alleged closure by the proprietor was not genuine or real and that the new company was successor-in-interest of the proprietor and hence was bound to continue to employ the former workmen. It was also contended that there was in effect a lockout and the workmen concerned were entitled to reinstatement. The Tribunal found that the closure of the former business on the alleged financial grounds was not genuine, and that the company, though in law a separate entity, was formed to carry on and continue the former business under a different name and the refusal by it to employ some of the old employees amounted to a lockout with the result that a reinstatement of the workmen was ordered. The appeal by the company to the Supreme Court was dismissed. This Court held that a case like the one before it could not be decided principally on the consideration of the abstract point of law as to whether and when a successor in business is bound to continue in employment and workmen employed by the former owner and having regard to the material findings of fact recorded by the Tribunal the validity of the award could not be questioned on abstract legal grounds.

In the *Dahingeapara Tea Estate case*[2], there was an agreement between Dahingeapara Tea Company (the vendor) and Nikhli Jute Baling Company, Ltd. (the purchaser) whereby the vendor agreed to sell absolutely and the purchaser to buy as and from 1st January 1954, the entire tea estate known as Dahingeapara Tea estate with all its gardens, bushes, machinery and appurtenances etc., at or for the sum of Rs. 9,50,000. The purchaser was to have the option of taking such members of the staff as it would in its absolute discretion consider useful and sufficient for running it. The members of the staff as would be selected by the purchaser would be given fresh appointment and any liability whatsoever for their past services, including bonus, gratuity etc., would be on the vendor's account. The dispute which was referred for adjudication was, whether the transfer of the management could put an end to the services of the staff of the tea estate and whether the agreement of transfer would deprive the members of the staff of their rights of service under the original contracts of service and of continuity of their services. The second question was, whether the outgoing management was justified in proposing to terminate the services of the members of the staff from the time when the management of the tea estate had changed hands and whether the incoming management was justified in refusing to maintain the continuity of service. The Tribunal found that the garden was sold as a going concern, that the services of the staff continued up to 4th January, 1954, that retrenchment had not been necessitated by or on account of reasons of trade and that the transfer could not effect a change in the service conditions of the

1. (1958) 2 L.L.J. 660. 2 (1958) 2 L.L.J. 498.

staff. The result was that the purchaser was held to be not justified in refusing to maintain the continuity of service. The award directed that those of the members of the former staff who had been kept out of service in the garden in question from the time the new management had taken over charge but who would be willing to be reinstated in their former posts on the previous terms and conditions of their service be reinstated in their former posts and that those of the members of the old staff who had been kept out of service in the garden and had not since taken any employment elsewhere be paid their salaries for the period of their forced unemployment which was caused at the instance of the purchaser. The Labour Appellate Tribunal set aside the award made by the Tribunal. This Court in appeal did not find it necessary to determine the larger question as to whether, on a transfer of business as a going concern, the incoming management becomes a successor to the outgoing management and if so, to what extent the incoming management must recognise the right of labour already accrued as to gratuity, bonus etc., and to continuity of service. It was further observed that it was not the function of the Industrial Tribunal to decide the abstract question of law, whether on a transfer of management consequent on a sale, the services of workmen were automatically put an end to. But it was held that there was a dispute which could be referred for adjudication and the reference being competent the Tribunal had jurisdiction to go into it and there was no reason for the Appellate Tribunal displacing the findings of the Industrial Tribunal.

It will be noticed that these two decisions were given before the amendment of the Industrial Disputes Act by the inclusion of section 25-FF and section 25-FFF. Now the two sections govern such cases. Under section 25-FF where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of section 25-F as if the workman had been retrenched. This section however is not to apply to a workman if his service had not been interrupted by such transfer, the terms and conditions of his service after transfer are not in any way less favourable to him than those applicable to him immediately before the transfer and the new employer is, under the terms of such transfer, legally liable to pay to the workman in the event of his retrenchment, compensation on the basis that his service has been continuous and had not been interrupted by the transfer.

Under section 25-FFF (1) where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of section 25-F as if the workman has been retrenched. We are not concerned with sub-section (2) in this case. The result is that if there is in fact a closure, section 25-FFF will come into play. In this case, however, it must be stated that the new company, Andhra Prabha (P.), Ltd. agreed to take over all employees at the time employed by the vendor in connection with the two publications as and from the date of taking over without any break in the continuity of their service and on the same terms and conditions as before.

It is impossible to lay one's finger on the exact cause for Ramnath Goenka making up his mind to transfer a part of the undertaking to Vijayawada and another part to Madurai. It may be because he really felt that the Telugu papers would do better if printed and published at Vijayawada. It may also be that he wanted to cirumvent the recommendation of the Press Commission with regard to the wages payable by the bigger units of newspapers. Again there can be no doubt that he did not like the agitation of the employees and probably thought that by the dispersal of the units the scope for agitation would be minimised. He was undoubtedly taking all steps in this regard as the resolutions passed by the shareholders of the company in February, 1959, followed by the resolution of the Board of Directors and

the agreement for sale of some machinery to the Andhra Prabha (P.), Ltd., on the 15th of April, 1959 would show. The workers probably were nettled by the fact that they had not been consulted in regard to all this. While it is not possible to say that the alleged acts of sabotage and indiscipline said to have taken place on 26th April, 1959 were of a very serious nature, Goenka stated in his evidence before the Tribunal that after the demonstration of the labourers before his office on the 28th of April and their prevention of ingress and egress of the members of the staff to and from the office building he decided to close down his undertaking at Madras.

On the evidence before the Tribunal to which our attention was drawn by Counsel on both sides, it appears to us that while the Management might have taken into confidence the employees and discussed with them the scheme for the dispersal of the undertaking the decision to go on strike was unwarranted and disastrous. Even if there had been no strike on the 27th of April, it seems to us that the scheme of dispersal would have been given effect to afterwards although it was the strike which precipitated matters.

The Tribunal has found that there was a closure but that took place not in April, 1959 but in November, 1959. In arriving at this conclusion the Tribunal relied on several factors. The first of these is that Andhra Prabha Illustrated Weekly came to be printed at the Dinamani press by the Indian Express (Madurai), Ltd. and located in the block of buildings belonging to Express Newspapers Ltd., situate in Mount Road, Madras, in pursuance of an agreement, dated 30th September, 1960, between the Indian Express, Madurai (P.), Ltd., and the Andhra Prabha (P.), Ltd. The Tribunal further found that it was on the 2nd of September, 1960 that the offset rotary press and allied equipment belonging to Express Newspapers (P.) Ltd. and located in the Express Estate, Mount Road, Madras were hired to the Indian Express Madurai (P.), Ltd. From this the Tribunal concluded that

> "the Andhra Prabha Daily and the Andhra Prabha Illustrated Weekly as also the Indian Express, Madurai edition and Dinamani Daily edition could have made use of the off set rotary press at the Express Estate, Madras, on occasions when the use of the offset rotary press became necessary till the machines were hired to the Madurai company under Exhibit M-46."

In our opinion the existence of the offset rotary press at the Express Estate, Madras until they were hired out to the Indian Express Madurai (P.), Ltd. does not warrant the conclusion that the company could have made use of the rotary press when it wanted to. We have got to judge things by what was done and not by what could have been done.

Again the circumstances that some of these journals came to be published sometime after May, 1959 under new declarations made by publishers respectively on behalf of the Andhra Prabha (P.), Ltd. and the Indian Express, Madurai (P.) Ltd. cannot be taken into consideration for finding against the closure of the company's undertaking in April, 1959. The Tribunal appears to have placed some reliance on the fact that Ramnath Goenka admitted having advanced a sum of Rs. 3 lakhs to the Madurai Company as also diverse sums totalling Rs. 27 lakhs to other companies including the two daughter companies (at Vijayawada and Madurai) up to the end of December, 1960. The Tribunal found that (*a*) ultimately the Indian Express, Bombay, Ltd. purchased all the shares of Andhra Prabha (P.), Ltd. and Indian Express, Madurai (P.), Ltd. and became a public company towards the end of 1960; (*b*). Before the company became a public company, Ramnath Goenka and the members of his family held 4,000 out of 4,200 shares; (*c*) till May, 1959 the company which owned the entire group of newspapers published by the same Management at three branch offices one in Delhi, a second in Madurai and the third in Bombay. As a result of the splitting up, the position was that the Express Newspapers (P.), Ltd., in Delhi took up the Delhi publications, the Indian Express Bombay (P.), Ltd., took up the publications published by the company from Bombay, the Indian Express, Madurai (P.), Ltd., took up the publications issued from Madurai and Andhra Prabha (P.), Ltd. Vijayawada took up the two Telugu publications. According to the Tribunal " it was only the Madurai company and the Vijayawada

company that relied upon the support of the parent company after May, 1959 for printing and publishing the papers acquired by them." The Tribunal further found that this position continued for some time after May, 1959 inasmuch as

"(1) The teleprinter service installed in the Express Estate Building, Mount Road continued to be used till the end of October, 1959 and out of nine circuits comprised in the teleprinter service, seven were routed through Madras and these were allotted to the Madurai company for a period of three months commencing from 1st November, 1959. (2) Photographic materials used in the processing department maintained by the company up to October, 1959 were purchased by the public company for the benefit of the two daughter companies; (3) thirty-two of the former employees of the company including a reporter were retained in the service of the company after April, 1959; (4) No intimation was sent to the Commissioner or other competent authority under the Employees' Provident Fund Act of the termination of employment of 700 workmen and working journalists, and (5) After April, 1959 a common advertising department for the two daughter-companies was maintained at the Express Estate Building as could be seen from certain circulars issued in December, 1959."

From all this the Tribunal inferred that the suspension of the business was a lockout at the inception and became a genuine closure only in October-November, 1959. Before us, reliance was placed by Mr. Mohan Kumaramangalam on some of the above factors and the main plank of his argument was that in fact the parent-company launched and financially helped the other companies which were really benamidars for the parent-company. We do not think that even in Industrial law a new company which is an independent legal entity can be called a benamidar for another older organisation because there was in both companies a person or family of persons who could guide the destinies of the two companies. The Express Newspapers (P.), Ltd. was later transformed into a public company and it would not be proper to describe the relationship of the Vijayawada and the Madurai companies as daughter-companies or as benamidars of the company. We have to bear in mind that the company, *i.e.*, Express Newspapers (P.), Ltd. did not come to an end in April, 1959. It only closed its undertaking of publishing several newspapers and weeklies. It had very valuable property on its hands after April, 1959 and some persons had to be retained in service to look after the property. The fact that one of them was a reporter cannot lead to the inference that the company did not close down its business but could take it up whenever it wanted to. Further, the failure to inform the Provident Fund authorities was an omission but that cannot mean that the workers continued to be in the service of the company or were meant to be taken back into its service as soon as they became submissive to Ramnath Goenka. With regard to the teleprinter service, we were told that it had been paid for up to a certain date and the fact that the Madurai and Vijayawada companies used the teleprinter service till the end of October, 1959 would not either by itself or taken in conjunction with the other circumstances, justify the conclusion that the company retained the teleprinter service for its own use, if necessary.

To all intents and purposes, the business of the company was closed from the 29th of April, 1959 and whatever might have been the motive behind the closure it was an effective one from April, 1959 and we see no reason to hold with the Tribunal that the closure became effective sometime in November, 1959.

On behalf of the employees an application has been made for leading additional evidence. In this application events which took place after the publication of the award are relied on as going to show that the discontinuance of the publications from Madras was a mere ruse and a device adopted by the company to coerce and intimidate the employees and that publication of the newspapers had been commenced soon after the publication of the award. We do not think it necessary to go into this matter at any length because a break of over four years had intervened in between and what the company does after the lapse of this long period cannot and ought not to be taken into consideration in order to find out whether the closure was a real one or was a mere device as suggested by the employees.

The evidence on record shows that Ramnath Goenka's plan was not to give up the business of newspaper publications altogether but he wanted to distribute his business to different places. Whatever may be the motive behind such plan, he had only carried out that plan into effect after the publication of the award and this cannot lead us to the conclusion that the closure was an assumed one. In our view, the strike was not justified and the Management was entitled to close the undertaking on 29th April, 1959.

In the result, there will be no order on this application. The appeals by the companies are allowed and the finding on the second issue and the award set aside. Appeal No. 9 of 1966 by the workmen will have to be dismissed in view of the above. There will be no order as to costs in all the appeals.

V.M.K. *Appeals by the Company allowed ;*
Appeal by the Workmen dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—R. S. BACHAWAT, J.M. SHELAT AND V. BHARGAVA, JJ.

Dwarampudi Nagaratnamba (In all the Appeals) .. *Appellants**

v.

Kunuku Ramayya and another, etc. .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 6 (h)—*Gift of coparcenary property by a member belonging to Madras School of Mitakshara Law to his concubine—Gift motivated by past cohabitation—Whether hit by section* 6 (h)—*Validity of gift—Whether subsequent disruption of joint family validates gift.*

Past cohabitation was the motive and not the consideration for the transfers in question. The transfers were without consideration and were by way of gifts. The gifts were not hit by section 6 (*h*) of the Transfer of Property Act, by reason of the fact that they were motivated by a desire to compensate the concubine for her past services.

Though the transferor was free to make a gift of his own property to his concubine and it was not hit by section 6 (*h*) of the Transfer of Property Act, but, as the properties gifted were coparcenary properties, the transferor being governed by Madras School of Mitakshara law, had no power to make a gift of even his undivided interest in the coparcenary properties to his concubine.

Subsequent disruption of the joint family will not validate the invalid gifts.

Appeals by Special Leave from the Judgment and Decree, dated the 9th February, 1962, of the Andhra Pradesh High Court in Tr. A. No. 558 of 1957 and A.S. Nos. 89 and 157 of 1957 respectively.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair* and *B. Parthasarathy*, Advocates and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant (In all the Appeals).

C. R. Pattabhiraman and *R. Ganapathy Iyer*, Advocates for Respondents (In C.As. Nos. 83 and 84 of 1965) and Respondent Nos. 1 to 5 (In C.A.No. 85 of 1965).

The Judgment of the Court was delivered by

Bachawat, J.—One Venkatacharyulu was the Karta of a joint family consisting of himself and his four sons. The appellant was his concubine since 1945 until his death on 22nd February, 1949. By two registered deeds purporting to be sale deeds dated 15th April, 1946, (Exhibits A-1 and A-2), he transferred to the appellant certain properties belonging to the joint family. In 1947 after the execution of

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* C. As. Nos. 83 to 85 of 1965. 19th July, 1967.

Exhibits A-1 and A-2 there was a disruption of the joint family and a severance of the joint status between Venkatacharyulu and his sons. In 1954 his widow and sons instituted O.S. No. 12 of 1954 against the appellant for recovery of possession of the properties alleging that the documents dated 15th April, 1946, were executed without consideration or for immoral purposes and were void. The appellant instituted against his widow and sons O.S. No. 63 of 1954, asking for general partition of the joint family properties and for allotment to her of the properties conveyed by the two deeds. She also instituted O.S. No. 62 of 1954 against one of his sons and another person asking for damages and mesne profits for wrongful trespass on the properties. The trial Court dismissed O.S. No. 12 of 1954 and O.S. No. 62 of 1954 and decreed O.S. No. 63 of 1954. From these decrees appeals were preferred in the High Court of Andhra Pradesh. The High Court confirmed the decree in O.S. No. 62 of 1954, allowed the two other appeals, dismissed O.S. No. 63 of 1954 and decreed O.S. No. 12 of 1954, the decree for possession in respect of the properties covered by Exhibit A-1 being conditional on payment by the respondents of the value of improvements made by the appellant to the properties. From the decrees passed by the High Court, the present appeals have been filed by Special Leave.

The High Court found that the transfers under Exhibit A-1 and Exhibit A-2 were not supported by any consideration by way of cash or delivery of jewels. This finding is not challenged before us. The High Court held that the transfers were made by Venkatacharulu in favour of the appellant in view of past illicit cohabitation with her, such past cohabitation was the motive and not the consideration for the transfers and the two deeds though ostensibly sale deeds, were in reality gift deeds. It held that Venkatacharyulu had no power to make a gift of the joint family properties, the two deeds were invalid and the subsequent severance of joint status in 1947 could not validate them.

In this Court, it is common case that future illicit cohabitation was not the object or the consideration of the transfers under Exhibit A-1 and Exhibit A-2. The appellant contends that Venkatacharyulu agreed to make the transfers in consideration of past cohabitation, having regard to section 2 (*d*) of the Indian Contract Act, 1872, her past service was a valuable consideration and Venkatacharyulu was competent to alienate for value his undivided interest in the coparcenary properties. The respondents contend that the transfers were by way of gifts and not in consideration of the past cohabitation, and Venkatacharyulu was not competent to make a gift of the coparcenary properties. In the alternative, the respondents contend that assuming that the transfers were made in consideration of past cohabitation, they were hit by section 6 (*h*) of the Transfer of Property Act, 1882.

Our findings are as follows :—

Venkatacharyulu and the appellant were parties to an illicit intercourse. The two agreed to cohabit. Pursuant to the agreement each rendered services to the other. Her services were given in exchange for his promise under which she obtained similar services. In lieu of her services, he promised to give his services only and not his properties. Having once operated as the consideration for his earlier promise, her past services could not be treated under section 2 (*d*) of the Indian Contract Act as a subsisting consideration for his subsequent promise to transfer the properties to her. The past cohabitation was the motive and not the consideration for the transfers under Exhibits A-1 and A-2. The transfers were without consideration and were by way of gifts. The gifts were not hit by section 6 (*h*) of the Transfer of Property Act, by reason of the fact that they were motivated by a desire to compensate the concubine for her past services.

In *Mt. Balo* v. *Mt. Parbati*[1], the Court held that the assignment of mortgagee's rights to a woman in consideration of past cohabitation was not hit by section 6 (*h*) o the Transfer of Property Act and was valid. Properly speaking, the past cohabitation was the motive and not the consideration for the assignment. The assignment

1. I.L.R. (1940) All. 371 : A.I.R. 1940 All. 385.

was without consideration by way of gift and as such was not hit by section 6 (*h*). In *Istak Kanu Musalman* v. *Ranchhod Zipru Bhate*[2], the Court rightly held that past cohabitation was the motive for the gift under Exhibit 186, and the gift was valid but in holding that the promises to make the gifts under other exhibits were made in consideration of past illicit cohabitation and consequently those gifts were invalid, the Court seems to have too readily assumed that past cohabitation was the consideration for the subsequent promises.

Venkatacharyulu was free to make a gift of his own property to his concubine. The gifts under Exhibits A-1 and A-2 were not hit by section 6 (*h*) of the Transfer of Property Act. But the properties gifted under Exhibit A-1 and A-2 were coparcenary properties. Under the Madras School of Mitakshara Law by which Venkatacharyulu was governed, he had no power to make a gift of even his undivided interest in the coparcenary properties to his concubine. The gifts were therefore invalid.

The invalid gifts were not validated by the disruption of the joint family in 1947. After the disruption of the joint family, Venkatacharyulu was free to make a gift of his divided interest in the coparcenery properties to the appellant, but he did not make any such gift. The transfers under Exhibits A-1 and A-2 were and are invalid. We find no ground for interfering with the decrees passed by the High Court.

In the result, the appeals are dismissed. There will be one set of costs and one hearing fee.

S.V.J. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO AND V. RAMASWAMI, JJ.

D. Sanjeevayya .. .. *Appellant**

v.

The Election Tribunal, Andhra Pradesh and others .. .. *Respondents.*

Representation of the People Act (XLIII of 1951), section 150 (1)—Scope—Duty of Election Commission under—Election Petition pending—Member concerned resigning during the pendency of the petition—Election Commission if bound to call for a bye-election without even waiting for the disposal of election petition.

Interpretation of Statues—Rule of harmonious construction.

The provisions of section 150 of the Representation of the People Act, 1951 must be interpreted in the context of sections 84 and 98 (*c*) and other relevant provisions of the same Act. It is a well-settled rule of construction that the provisions of a statute should be so read as to harmonise with one another and one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them Crawford's Statutory Construction, Referred to.

When an election petition has been refrred to a Tribunal by the Election Commission and the former is seized of the matter, the petition has to be disposed of according to law. The returned candidate cannot get rid of an election petition filed against him by resigning his seat in the Legislature, whatever the reason for his resignation may be. The petitioner in the election petition might pray for a declaration that himself or another has been elected; that has to be decided before the seat can become vacant.

Hence an Election Commission is not bound to notify or hold a bye-election immediately after a vacancy is caused by the resignation of a member, especially

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1. (1946) 48 Bom.L.R. 775 : I.L.R. (1947) Bom. 206, 217 : A.I.R. 1947 Bom. 198.

* C.A. No. 1 of 1967. 27th January, 1967.

when an election petition regarding the same is pending before a competent Tribunal. The Election Commission may suspend taking action under section 150 of the Act till the result of the election petition is known. The section does not say that the bye-election should be held forthwith or immediately. There may be situations in which the Election Commission may not hold a bye-election at all or hold the bye-election after some months. To hold otherwise, may lead to strange and anamolous results in particulars cases. May's Parliamentary Practice, Referred :

Appeal by Special Leave from the Judgment and Order dated the 19th September, 1966 of the Andhra Pradesh High Court in Writ Petition No. 1253 of 1965.†

B. Sen Senior Advocate, (*T. Lakshmaiah, M. M. Kshatriya, K. Venkataramaiah* and *G. S. Chatterjee*, Advocates, with him), for Appellant.

M. K. Ramamurthi, Shyamala Pappu and *Vineet Kumar*, Advocates, for Respondent No. 2.

R. H. Dhebar and *S. S. Javali*, Advocates, for Respondent No. 3.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the judgment of the High Court of Andhra Pradesh dated 19th September, 1966 in Writ Petition No. 1253 of 1965.

At the last General Election to the Andhra Pradesh Leglisative Assembly held in February, 1962, the appellant and the 2nd respondent—P. Rajaratna Rao—were the contesting candidates for election from the Kodumuru constituency in Kurnool District. The result of the election was announced on 25th February, 1962 and the appellant was declared to have been elected by a majority of about 7,000 votes. The second respondent thereafter filed an election petition (Election Petition No. 180 of 1962) under section 81 of the Representation of the People Act, (XLIII of 1951), hereinafter called the 'Act' calling in question the election of the appellant on the ground that various corrupt practices had been committed at the election and claiming a two-fold relief namely, that the election of the appellant should be declared to be void and that respondent No. 2 himself should be declared to have been duly elected. After the appellant had filed a written statement, the Election Tribunal, Hyderabad framed twenty-two issues, but the trial of the election petition could not be proceeded with as the appellant filed several interlocutory applications raising various objections and after they were overruled by the Election Tribunal, the appellant filed several writ petitions in the Andhra Pradesh High Court. During the pendency of the election petition the appellant was appointed by the President of India as Minister for Labour and Employment in the Central Cabinet. Subsequent to that appointment the appellant was elected as a Member of the Rajya Sabha on 26th March, 1964. Thereupon the appellant resigned his seat in the Legislative Assembly on 8th April, 1964, and intimated the same to the Speaker of the Assembly. On 2nd September, 1965 the appellant filed the present Writ Petition (Writ Petition No. 1253 of 1965) before the Andhra Pradesh High Court praying for a writ in the nature of *mandamus* commanding the Election Commission of India to Act under section 150 of the Act and call upon the Kodumuru constituency to elect a person for the purpose of filling up the vacancy caused by the resignation of the appellant. The appellant also prayed for a writ 'directing the Election Commission to withdraw Election Petition No. 180 of 1962 from the file of the Election Tribunal, Hyderabad and to stay all further proceedings in the trial of that election petition pending the disposal of the writ petition.' In the course of argument before the High Court the appellant did not press the second prayer for 'directing the Election Commission to withdraw the election petition from the file of the Election Tribunal, Hyderabad'. With regard to the first prayer, the High Court held that no case was made out for the issue of a writ of *mandamus* to the Election Commission and accordingly dismissed the writ petition.

†(1967) 2 An.W.R. 53.

On behalf of the appellant the argument was put forward that as soon as the appellant resigned his seat in the Legislative Assembly under Article 190. (3) (*b*) of the Constitution of India there was a duty cast on the Election Commission to take steps to hold a bye-election for filling the vacancy so caused under section 150 of the Act. It was contended that it was incumbent upon the Election Commission to discharge this duty immediately without waiting for the result of the election petition filed by respondent No. 2 on 11th April, 1962.

Article 190 (3) of the Constitution states :

" 190.—(3) If a member of a House of the Legislature of a State—

(*a*) becomes subject to any of the disqualifications mentioned in clause (1) of Article 191; or

(*b*) resigns his seat by writing under his hand addressed to the Speaker of the Chairman, as the case may be,

his seat shall thereupon become vacant."

Article 324 (1) of the Constitution provides :

" The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

Section 150 (1) of the Act states as follows :

" 150. (1) When the seat of a member elected to the Legislative Assembly of a State becomes vacant or is declared vacant or his election to the Legislative Assembly is declared void, the Election Commission shall, subject to the provisions of sub-section (2), by a notification in the Official Gazette, call upon the Assembly constituency concerned to elect a person for the purpose of filling the vacancy so caused before such date as may be specified in the notification; and the provisions of this Act and of the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy."

Section 84 of the Act provides :

" A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected."

Section 98 reads as follows :

" At the conclusion of the trial of an election petition the Tribunal shall make an order,—

(*a*) dismissing the election petition; or

(*b*) declaring the election of all or any of the returned candidates to be void; or

(*c*) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected."

It was argued for the appellant that section 150 of the Act contemplates three contingencies on the happening of any one of which the Election Commission may call for a bye-election. The first contingency namely, the seat of a member becoming vacant arises when a member resigns his seat; the second contingency namely, the seat of a member being declared vacant, is brought about when a member absents himself from meetings of the Houses of the Legislature for a period of sixty days without the permission of the House; while the third contingency arises when the election of a member to the Legislative Assembly is declared void by an Election

Tribunal under section 98 (*b*) of the Act at the conclusion of the trial of an election petition. It was argued for the appellant that the three contingencies contemplated by the section are mutually exclusive and upon the happening of any one of them an obligation is cast upon the Election Commission to take steps to hold a bye-election forthwith. In the present case, it was pointed out that the first contingency has arisen namely, the seat of a member became vacant upon his resignation and it was manifestly the duty of the Election Commission to take steps forthwith to hold a bye-election to fill the vacancy irrespective of the fact that an election petition was pending in which the second respondent had asked for a declaration that the election of the appellant was void and also for the relief that he himself should be declared to be duly elected.

We are unable to accept the argument of the appellant as correct. In our opinion, the provisions of section 150 of the Act must be interpreted in the context of sections 84 and 98 (*c*) and other relevant provisions of Part III of the same Act. If the interpretation contended for by the appellant is accepted as correct the vacancy must be filled by a bye-election as soon as a member resigns his seat notwithstanding the pendency of an election petition challenging his election. If the candidate who filed the election petition eventually gets a declaration that the election of the member is void and that he himself had been duly elected there will be two candidates representing the same constituency at the same time, one of them declared to be duly elected at the General Election and the other declared to have been elected at the bye-election and an impossible situation would arise. It cannot be supposed that Parliament contemplated such a situation while enacting section 150 of the Act. Parliament could not have intended that the provisions of Part VI of the Act pertaining to election petitions should stand abrogated as soon as a member resigns his seat in the Legislature. It is a well-settled rule of construction that the provisions of a statute should be so read as to harmonise with one another and the provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. The principle stated in Crawford's Statutory Construction at page 260 is as follows :

> "Hence, the Court should, when it seeks the legislative intent, construe all of the constituents parts of the statute together, and seek to ascertain the legislative intention from the whole act, considering every provision thereof in the light of the general purpose and object of the Act itself, and endeavouring to make every part effective, harmonious, and sensible. This means, of course, that the Court should attempt to avoid absurd consequences in any part of the statute and refuse to regard any word, phrase, clause or sentence superfluous, unless such a result is clearly unavoidable."

It is therefore not permissible, in the present case, to interpret section 150 of the Act in isolation without reference to Part III of the Act which prescribes the machinery for calling in question the election of a returned candidate. When an election petition has been referred to a Tribunal by the Election Commission and the former is seized of the matter, the petition has to be disposed of according to law. The Tribunal has to adjudge at the conclusion of the proceeding whether the returned condidate has or has not committed any corrupt practice at the election and secondly it has to decide whether the second respondent should or should not be declared to have been duly elected. A returned candidate cannot get rid of an election petition filed against him by resigning his seat in the Legislature, whatever the reason for his resignation may be. In the present case, the election petition filed by respondent No. 2 has prayed for a composite relief namely, that the election of the appellant should be declared to be void and that respondent No. 2 should be declared to be duly elected. In a case of this description the Election Commission is not bound immediately to call upon the Assembly constituency to elect a person for the purpose of filling the vacancy caused by the resignation of the appellant. It is open to the Election Commission to await the result of the election petition and thereafter decide whether a bye-election should be held or not. If the election petition is ultimately dismissed or if the election is set aside but no

further relief is given, a bye-election would follow. If, however, respondent No. 2 who filled the election petition or any other candidate is declared elected the provisions of section 150 of the Act cannot operate at all because there is no vacancy to be filed. In the present case, therefore, we hold that the Election Commission is not bound under section 150 of the Act to hold a bye-election forthwith but may suspend taking action under that section till the result of the election petition filed by respondent No. 2 is known.

This view is also supported by the circumstance that no time-limit is fixed in the section for the Election Commission to call upon the Assembly constituency concerned to elect a person for filling the vacancy. Nor does the section say that the Election Comm'ssion shall had a bye-election " forthwith " or " immediately ". It is also conceivable that there may be a situation in which the Election Commission may not hold a bve-election at all or may hold the bye-election after a delay of 2 or 3 months. Take for instance, a case where a member resigns his seat in the Legislative Assembly of a State 3 months before a General Election is due to be held. It cannot be suggested that the Election Commission is bound under section 150 (1) of the Act to hold a bye-election forthwith in that vacancy. Take also another instance where a member of an Assembly of Himachal Pradesh resigns his seat during winter. It cannot be argued that the Election Commission is bound to issue a notification for a bye-election forthwith though the climatic conditions are unsuitable for holding such a bye-election.

The view that we have expressed as to the scope and effect of section 150 of the Act is borne out by the following passage from May's Parliamentary Practice, 17th Edition pages 176-177:

" Where a vacancy has occurred prior to, or immediately after, the first meeting of a new Parliament, the writ will not be issued until the time for presenting election petitions has expired. Nor will a writ be issued, if the seat which has been vacated be claimed on behalf of another candidate.

In December, 1852, several Members, against whose return election petitions were pending, accepted office under the Crown. After much consideration, it was agreed that where a void election only was alleged, a new writ should be issued (Southampton and Carlow writs, 29th December, 1852); and again, in 1859 and in 1880, the same rule was adopted.

Where the seat is claimed, it has been ruled that the writ should be withheld until after the trial of that claim (Athlone Election, 1859), or until the petition has been withdrawn [Louth Election Mr. Chickester Fortescue), 1866].

In 1859, Viscount Bury accepted office under the Crown, while a petition against his return for Norwich, on the ground of bribery, was pending; and, as his seat was not claimed, a new writ was issued. Being again returned, a petition was presented against his second election, claiming the seat for another candidate. The petition against the first election came on for trial, and the committee reported that the sitting Members, Lord Bury and Mr. Schneider, had been guilty, by their agents, of bribery at that election. By virtue of that report, Lord Bury, under the Corrupt Practices Prevention Act, became incapable of sitting or voting in Parliament, or, in other words, ceased to be a Member of the House; but as a petition against his second return, claiming the seat, was then pending, a new writ was not issued [Parl. Deb. (1859) 155, c. 865]."

For these reasons we hold that the High Court was right in holding that no case was made out for the issue of a writ of *mandamus* to the Election Commission and this appeal must be accordingly dismissed with costs.

R.M. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT:—K. N. WANCHOO Chief Justice, R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.

The Andhra Sugars Ltd. and another, etc. .. *Petitioners**

v.

The State of Andhra Pradesh and others .. *Respondents*

Basti Sugar Mills Ltd. .. *Intervener.*

Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act (XLV of 1961), *section* 21—*Power of levy tax on purchases of sugarcane under Entry* 54, *List II of Constitution of India—Whether unconstitutional and* ultra vires—*Whether violative of Articles* 14 *and* 301 *of Constitution of India—Power to levy use tax.*

Sale of Goods Act (III of 1930), *section* 4—*Contract of sale—Whether there can be contract of sale under compulsion of statute.*

To constitute a 'Purchase of goods' within Entry 54, List II, Schedule VII of the Constitution of India, there must be an agreement for purchase of goods and the passing of property therein pursuant to such an agreement.

Whether there can be contract of sale under compulsion of a statute or not, depends upon the facts of each case and terms of the particular statute regulating the dealings whether, the parties have entered into a contract of sale of goods. Under Act XLV of 1961 and the Rules framed thereunder, the canegrower in the factory zone is free to make or not to make an offer, the occupier of the factory is bound to accept it. The resulting agreement is recorded in writing and is signed by the parties. The consent of the occupier of the factory to the agreement is not caused by coercion, undue influence, fraud, misrepresentation or mistake. His consent is free as defined in section 14 of the Indian Contract Act though he is obliged by law to enter into the agreement. The compulsion of law is not coercion as defined in section 15 of the Act. In spite of the compulsion, the agreement is neither void nor voidable. In the eye of the law, the agreement is freely made. The parties are competent to contract. The agreement is made for a lawful consideration and with lawful object and is not void under any provisions of law. There is thus a priority of contract between the parties. The agreements are enforceable at law and contracts of sale of sugarcane as defined in section 4 of the Indian Sale of Goods Act. The purchasers of sugarcane under the agreement can be taxed by the State Legislature under Entry 54, List II.

There can be levy of tax with reference to the tonnage and it may be levied on the occupier of the factory by reference to the weight of the goods purchased by him. The State Legislature may levy tax on purchases of cane required for use concemption or sale in a factory. The State Legislature is competent to tax and also to exempt from payment of tax sales or purchases of goods required for specific purposes.

The taxable event under section 21 is the purchase of goods and not the use or enjoyment of what is purchased. The tax is not on the entry of the cane into the factory, (it is not payable on cane cultivated by the factory and entering the factory premises).

Under section 21, the same rate of tax is levied on purchases of all cane required for use, consumption or sale in a factory. There is no discrimination at all. A non-discriminatory tax on goods does not offend Article 301 unless it directly impedes the free movement or transport of goods. Normally, a tax on sale of goods does not directly impede the free movement or transport of goods Section 21 is no exception. It does not impede the free movement or transport of goods and is not violative of Article 301.

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* W.Ps. Nos. 53,100,101,105 and 106 of 1967. 29th September, 1967.

The differential treatment of the factories producing sugar by means of vacuum pans, khandasari units producing sugar by the open pan process and canegrowers using came for the manufacture of jaggery is reasonable and has a rational relation to the object of taxation. The Legislature could reasonably treat the three sets of users of cane differently for purpose of levy. Section 21 is not violative of Article 14.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

M. C. Setalvad, Senior Advocate (*A. V. Koteswara Rao, K. Rajendra Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Petitioners (In W.P. No. 53 of 1967).

N. C. Chatterjee, Senior Advocate (*A. V. Koteswara Rao, K. Rajendra Chaudhuri* and *K. R Chaudhuri*, Advocates, with him), for Petitioners (In W.P. No. 100 of 1967).

A. V. Koteswara Rao, K. Rajendra Chaudhuri and *K. R. Chaudhuri*, Advocate, for Petitioners (In W.P. No. 101 of 1967).

K. R. Chaudhuri and *K. Rajendra Chaudhuri*, Advocates, for Petitioners (In W.Ps. Nos. 105 and 106 of 1967).

C. K. Daphtari, Attorney-General for India (*A. V. Rangam*, Advocate, with him), for Respondents (In W.P. No. 53 of 1967).

P. Ram Reddy, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Respondents (In W.Ps. Nos. 100, 101, 105 and 106 of 1967).

Sachin Chaudhury, Senior Advocate (*G .L. Sanghi*, Advocate and *O.C. Mathur*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for the Intervener (In W.P. No. 53 of 1967).

The Judgment of the Court was delivered by

Bachawat, J.—In all these writ petitions under Article 32 of the Constitution the petitioners ask for an order declaring that section 21 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961 (Andhra Pradesh Act XLV of 1961) is unconstitutional and *ultra vires* and a direction prohibiting the respondents from levying tax under section 21 and to refund the tax already collected. Section 21 of the Act is in these terms:

"21. (1) The Government may, by notification, levy a tax at such rate not exceeding five rupees per metric tonne as may be prescribed on the purchase of cane required for use, consumption or sale in a factory.

(2) The Government may, by notification, remit in whole or in part such tax in respect of cane used or intended to be used in a factory for any purpose specified in such notification.

(3) The Government may, by notification, exempt from the payment of tax under this section—

(*a*) any new factory which, in the opinion of the Government has substantially expanded, to the extent of such expansion, for a period not exceeding two years from the date of completion of the expansion.

(4) The tax payable under sub-section (1) shall be levied and collected from the occupier of the factory in such manner and by such authority as may be prescribed.

(5) Arrears of tax shall carry interest at the rate of nine per cent. per annum.

(6) If the tax under this section together with the interest, if any, due thereon, is not paid by the occupier of a factory within the prescribed time, it shall be recoverable from him as an arrear of land revenue."

Section 2 (i) defines a factory which means any premises including the precincts thereof, wherein twenty or more workers are working or were working on any day during the preceding twelve months and in any part of which any manufacturing process connected with the production of sugar by means of vacuum pans is being carried on or is ordinarily carried on with the aid of mechanical power. Section 2 (m) defines the occupier of a factory. By Ordinance I of 1967 which was replaced by (Amendment) Act IV of 1967, the following new sub-section (1-A) was inserted and other consequential amendments were made in section 21 of the principal Act.

> "(I-A) The Government may, by notification, levy a tax at such rate, not exceeding three rupees and fifty paise per metric tonne, as may be prescribed on the purchase of cane required for use, consumption or sale in a khandsari unit."

Also the following sub-sections (*kk*) and (*kkk*) were inserted in section 2 of the principal Act:

> "(*kk*) 'khandsari sugar' means sugar produced by open-pan process in a khandsari unit from sugarcane juice, or from rab or gur or both, containing more than eighty per cent. sucrose;
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> (*kkk*) 'khandsari unit' means a unit engaged or ordinarily engaged in manufacture of khandsari sugar and includes a bel."

It may be mentioned that sales and purchases of sugarcane are exempt from tax under the Andhra Pradesh General Sales Tax Act, 1957. The petitioners own sugar factories as defined in section 2 (i). Their agents are the 'occupiers' of the factories as defines in section 2 (m). They purchased cane from canegrowers within their respective factory zones. The State Government had issued notifications levying tax under section 21. For the last several years the petitioners have paid the tax on their purchase of sugarcane and further demands are being made on them for payment of the tax. They challenge the *vires* and the constitutionality of section 21 on various grounds. The principal submissions were made by M. C. Setalvad who appeared in Writ Petition No. 53 of 1967 and his arguments were adopted by Counsel appearing in the other petitions. Mr. N. C. Chatterjee who appeared in Writ Petition No. 100 of 1967 raised a few additional contentions.

The submission of Mr. Setalvad is that section 21 so far as it levies a tax on the purchase of sugarcane by or on behalf of the petitioners from the canegrowers in their respective factory zones is *ultra vires* the powers of the Legislature under Entry No. 54, List II, Schedule VII of the Constitution in the light of the decision in *State of Madras* v. *Gannon Dunkerley & Co.*,[1]. Now, in *Gannon Dunkerley's case*[1]. the actual decision was that the Legislature had no power under List II, Entry 48, Schedule VII of the Government of India Act, 1935 to impose a tax on the supply of materials under an entire and indivisible contract for construction of buildings. But the Court also held that the phrase "sale of goods" in the Entry must be interpreted in the legal sense which it had in the Indian Sale of Goods Act; that the Provincial Legislature had no power to tax a transaction which was not a sale of goods in that sense and that in order to constitute a sale there must be an agreement for sale of goods for a price and the passing of property therein pursuant to such an agreement. Venkatarama Aiyar, J., said at pages 397-398:

> "Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods which of course presupposes capacity to contract, that it must be supported by money consideration and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale.".

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1. (1958) S.C.J. 696 : (1958) 2 An.W.R. (S.C.) 66 : (1958) 2 M.L.J. (S.C.) 66 : (1959) S.C.R. 379 : A.I.R. 1958 S.C. 560.

In the light of this decision, the expression "sale of goods" in Entry 54, List II Schedule VII of the Constitution must be given the same interpretation. On a parity of reasoning, to constitute a "purchase of goods" within this Entry, there must be an agreement for purchase of goods and the passing of property therein pursuant to such an agreement. The question, therefore, is whether the purchases by or on behalf of the petitioners from the canegrowers in their respective factory zones were made under agreements of purchase and sale.

It appears that the Cane Commissioner is empowered under section 15 of Act XLV of 1961 to declare any area as the factory zone for the purpose of supply of cane to a factory during a particular crushing season. Under section 16 (1) on the declaration of the factory zone the occupier of the factory is bound to purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner in accordance with the provisions of the schedule. Section 16 (2) prohibits the canegrowers in a factory zone from supplying or selling cane to any factory or other person otherwise than in accordance with the provisions of the schedule. Section 28 (2) (*l*) empowers the Government to make rules providing for the form of agreement to be entered into under the provisions of the Act. Rule 20 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Rules, 1951 framed under the Act provides that a canegrower or a canegrower's co-operative society may within 14 days of the order declaring an area as the factory zone or such extended time as may be fixed by the Cane Commissioner, offer in form No. 2 to supply cane grown in that area to the occupier of the factory and such occupier of the factory within 14 days of the receipt of the offer shall enter into an agreement in form No. 3 or form No. 4 with the canegrower or the canegrowers' co-operative society as the case may be for the purchase of the cane offered. Form No. 3 is the statutory form of agreement with a canegrower. By the agreement in Form No. 3 the occupier of the factory agrees to buy and the canegrower agrees to sell during the crushing season certain sugarcane crop grown in the area at the minimum price notified by the Government from time to time upon the terms and conditions mentioned in the agreement. The agreement contains an arbitration clause and is signed by or on behalf of the occupier of the factory and the canegrower. The agreement in Form No. 4 with a canegrowers' co-operative society is on the same lines. All the terms and conditions of the agreements and the mode of their performance are fixed and regulated by the Act and the Rules and orders made under the Act. Contravention of the provisions of the Act or of any rule or order made under the Act is punishable under section 23. The minimum price of sugarcane is fixed under the Sugarcane Control Order, 1966. The learned Attorney-General and Mr. Ram Reddy attempted to argue that the occupier of the factory has some option of not buying from the canegrower and some freedom of bargaining about the terms and conditions of the agreements. But after having read all the relevant provisions of the Act and the Rules, they did not pursue this point. We are satisfied that under the provisions of Act XLV of 1961 and the Rules framed thereunder, a canegrower in a factory zone is free to sell or not to sell his sugarcane to the factory. He may consume it or may process it into jaggery and then sell the finished product. But if he offers to sell his cane, the occupier of the factory is bound to enter into an agreement with him on the prescribed terms and conditions and to buy cane pursuant to the agreement in conformity with the instructions issued by the Cane Commissioner. The submission of the petitioners is that as they or their agents are compelled by law to buy cane from the canegrowers their purchases are not made under agreements and are not taxable under Entry No. 54, List II having regard to *Gannon Dunkerley's case*[1]. This contention requires close examination.

Under section 4 (1) of the Indian Sale of Goods Act, 1930, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in

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1. (1958) S.C.J. 696 : (1958) 2 An.W.R. (S.C.) 66: (1958) 2 M.L.J. (S.C.) 66 : (1959) S.C.R. 379: A.I.R. 1958 S.C. 560.

goods to the buyer for a price. By section 3 of this Act, the provisions of the Indian Contract Act, 1872 apply to contracts of sale of goods save in so far as they are inconsistent with the express provisions of the later Act. Section 2 of the Indian Contract Act provides that when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. Every promise and every set of promises forming the consideration for each other is an agreement. There is mutual assent to the proposal when the proposal is accepted and in the result an agreement is formed. Under section 10, all agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not by the Act expressly declared to be void. Section 13 defines consent. Two or more persons are said to consent when they agree upon the same thing in the same sense. Section 14 defines free consent. Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake as definied in sections 15 to 22. Now, under Act XLV of 1961 and the Rules framed under it, the canegrower in the factory zone is free to make or not to make an offer of sale of cane to the occupier of the factory. But if he makes an offer, the occupier of the factory is bound to accept it. The resulting agreement is recorded in writing and is signed by the parties. The consent of the occupier of the factory to the agreement is not caused by coercion, undue influence, fraud, misrepresentation or mistake. His consent is free as defined in section 14 of the Indian Contract Act though he is obliged by law to enter into the agreement. The compulsion of law is not coercion as defined in section 15 of the Act. In spite of the compulsion, the agreement is neither void nor voidable. In the eye of the law, the agreement is freely made. The parties are competent to contract. The agreement is made for a lawful consideration and with a lawful object and is note void under any provisions of law. The agreements are enforceable by law and are contracts of sale of sugarcane as defined in section 4 of the Indian Sale of Goods Act. The purchases of sugarcane under the agreement acan be taxed by the State Legislature. under Entry 54, List II.

Long ago in 1702, Holt, C.J., said in *Lane* v. *Cotton*[2]:

> "When a man takes upon himself a public employment, he is bound to serve the public as far as his employment goes, or an action lies against him for refusing."

The doctrine that one who takes upon a public employment is bound to serve the public was applied to innkeepers and common carriers. Without lawful excuse, an innkeeper cannot refuse to receive guests at his inn, and a common carrier cannot refuse to accept goods offered to him for carriage See Halsbury's Laws of England, 3rd Edition, Volume 4, Article 375 and Volume 21, Article 938. A more general application of the doctrine was arrested by the growth of the principle of *laissez faire* which had its heyday in the mid-nineteenth century. Thereafter, there has been a gradual erosion of the *laissez faire* concept. It is now realised that in the public interest, persons exercising certain callings or having monopoly or near monopoly powers should sometimes be charged with the duty to serve the public, and, if necessary, to enter into contracts. Thus, section 66 of the Indian Railways Act, 1890 compels the railway administration to supply the public with tickets for travelling on the railway upon payment of the usual fare. Section 22 of the Indian Electricity Act, 1910 compels a licensee to supply electrical energy to every person in the area of supply on the usual terms and conditions. Cheshire and Fifoot in their Law of Contract, 6th Edition, page 23 observe that for reasons of social security the State may compel persons to make contracts. One of the objects of Act XLV of 1961 is to regulate the purchase of sugarcane by the factory owners from the canegrowers. The canegrowers scattered in the villages had no real bargaining power.

2. Raym Ld. 646: 91 E.R. 17.

The factory owners or their combines enjoyed a near monopoly of buying and could dictate their own terms. In this unequal contest between the canegrowers and the factory owners, the law stepped in and compelled the factory to enter into contracts of purchase of cane offered by the canegrowers on prescribed terms and conditions.

In *The Indian Steel & Wire Products Ltd.* v. *The State of Madras*[1] the Court held that sales of steel products authorised by the Controller under clauses 4 and 5 of the Iron and Steel (Control of Production and Distribution) Order, 1941 were exigible to tax under Entry 54, List II. The Court found that the parties had entered into contracts of sale though in view of the Order the area of bargaining between the buyer and the seller was greatly reduced, Hegde, J., speaking for the Court said that as a result of economic compulsions and changes in the political outlook the freedom to contract was now being confined gradually to narrower and narrower limits. We have here a case where one party to a contract of sale is compelled to enter into it on rigidly prescribed terms and conditions and has no freedom of bargaining. But the contract, nonetheless, is a contract of sale.

In *Kirkness* v. *John Hudson & Co., Ltd.*[2], the House of Lords by a majority held that a compulsory vesting of title of the company's railway wagons in the British Transport Commission under section 29 of the Transport Act, 1947 was not a sale within the meaning of the phrase "is sold" in section 17 of the Income-tax Act, 1945. Under section 29 there was a compulsory taking of property. The assent of the company to the taking was not required by statute. By force of law, the property of the company was taken without its assent. There was no offer, no acceptance and no mutual assent and no contract resulted. The House of Lords held that mutual assent was an element of a transaction of sale. In *Gannon Dunkerley's case*[3] the Court approved of this principle and rejected the argument of Counsel that an involuntary transfer of title as in *Kirkness's case*[2], was a sale within the meaning of the legislative Entry. But the Court did not say that if one party was free to make an offer of sale and the other party was obliged by law to accept it and to enter into an agreement for purchase of the goods, a contract of sale did not result. In the present case, the seller makes an offer and the buyer accepts it. The parties then execute and sign an agreement in writing. There is mutual assent and a valid contract, though the assent of the buyer is given under compulsion of statute. Mr. Setelvad relied on the following passage in the Law of Contract by G. H. Treitel, at page 5 : "Where the legislation leaves no choice at all to one party, the transaction is not a contract." But the author does not cite any authority in support of the proposition. He adds that even a compulsory disposition of property may be treated as contract for the purpose of a particular statute and cites the case of *Ridge Nominees* v. *I. R. C.*[4]. There, the Court distinguishing *Kirkness's case*[2], held that the compulsory transfer of shares of a dissenting shareholder by a person authorised to make the transfer on his behalf under section 209 of the Companies Act, 1948 corresponding to section 395 of our Companies Act, 1956 was having regard to the machinery created by the section a conveyance on sale within section 54 of the Stamp Act, 1891. The Lord Justices gave separate opinions. It is worthwhile quoting the opinion of Donovan, L.J., who said :

"When the legislature, by section 209 of the Companies Act, 1948, empowers the transferee company to appoint an agent on behalf of a dissenting shareholder for the purpose of executing a transfer of his shares against a price to be paid to the transferor company and held in trust for the dissenting shareholder, it is clearly ignoring his dissent and putting him in the same position as if he had assented. For the purpose of considering whether this results in a sale, one must, I think, bear that situation in mind, and regard the dissent of the shareholder as overridden by

1. C. As. No. 1968 to 1970 of 1966, decided on 11th September, 1967.
2. L.R. (1955) A.C. 696.
3. (1958) S.C.J. 696 : (1958) 2 An.W.R. (S.C.) 66 : (1958) 2 M.L.J. (S.C.) 66 : (1959) S.C.R. 379.
4. (1962) 2 W.L.R. 3 : L.R. (1962) Ch. 376 : (1961) 3 All E.R. 1108.

an assent which the statute imposes upon him, fictional though this may be. Thus, in the context of section 209 the transfer becomes in law a conveyance on sale. This conclusion, in my opinion, does not run counter to what was said in the House of Lords in *Kirkness (Inspector of Taxes)* v. *John Hudson & Co. Ltd.*[1], where, in terms of the statute there under consideration, property belonging to other persons was declared to vest on a specified date in the Transport Commission against payment of compensation. This may be no more than a difference of machinery, but machinery may make the very difference between a sale and a mere expropriation against compensation. Lord Simonds, I venture to think, implies as much when he says he gets no assistance from the cases decided under the Stamp Acts."

In *M/s. New India Sugar Mills Ltd.* v. *Commissioner of Sales Tax, Bihar*[2], the Court by a majority held that the supply of sugar by a sugar factory to a Provincial Government in obedience to the directions of the Sugar Controller given under the Sugar and Sugar Products Control Order, 1946 was not a sale taxable under List II, Entry 48, Schedule VII of the Government of India Act, 1935. Mr. Setalvad placed strong reliance on the following passage in the judgment of Shah, J., at pages 469-470:

"A contract of sale between the parties is therefore a pre-requisite to a sale. The transactions of despatches of sugar by the assessees pursuant to the direction of the Controller were not the result of any such contract of sale. It is common ground that the Province of Madras intimated its requirements of sugar to the Controller, and the Controller called upon the manufacturing units to supply the whole or part of the requirement to the Province. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the State to purchase goods: he acted in exercise of his statutory authority. There was manifestly no offer to purchase sugar by the Province, and no acceptance of any offer by the manufacturer. The manufacturer was under the Control Order left no volition: he could not decline to carry out the order; if he did so he was liable to be punished for breach of the order and his goods were liable to be forfeited. The Government of the Province and the manufacturer had no opportunity to negotiate, and sugar was despatched pursuant to the direction of the Controller and not in acceptance of any offer by the Government."

Divorced from the context, this passage gives some support to the contention that there can be no contract if the acceptance of the offer is made under compulsion of a direction given by a statutory authority. But the passage must be read with the facts of the case. By clause 3 of the Sugar and Sugar Products Control Order, 1946, producers of sugar were prohibited from disposing of sugar except to persons specially authorised in that behalf by the Controller to acquire sugar on behalf of certain Governments. Clause 5 required every producer or dealer to comply with the directions issued by the Controller regarding production, sales, stocks and distribution of sugar. Clause 6 authorised the Controller to fix the price of sugar. Clause 7 (*i*) authorised the Controller to allot quotas of sugar for any Province and to issue directions to any producer or dealer for the supply of the sugar specifying the price, quantity and type or grade of the sugar and the time and manner of supply. Contravention of the directions entailed forfeiture of stocks under clause 11 of the Order and was punishable under rule 81 (4) of the Defence of India Rules, 1939. The admitted course of dealings between the parties was that the Governments of the consuming States used to intimate to the Sugar Controller their requirement of sugar and the factory owners used to send to him statements of their stocks of sugar. On a consideration of the requisitions and the statements of stock, the Controller used to make allotments. The allotment order used to be addressed by the Controller to the factory owner, directing him to supply sugar to the Government in question in accordance with the latter's despatch instructions. A copy of the allotment order used

1. L.R. 1955 A.C. 696.
2. (1964) 1 S.C.J. 644: (1963) 2 S.C.R. (Supp.) 459, 499.

simultaneously to be sent to the Government concerned and the latter then used to send to the factory detailed despatching instructions. In these circumstances, Kapur and Shah, JJ., (Hidayatullah, J., dissenting) held that by giving intimation of its requirement of sugar to the Controller and applying for allotment of sugar the Government of Madras did not make any offer to the manufacturer. The direction of the Controller to the manufacturer to supply sugar to the Government was given in the exercise of his statutory authority and was not the communication of any offer made by the Government. The despatch of the goods in compliance with the directions of the Controller was not the acceptance by the manufacturer of any offer, nor could it be deemed to be an offer by the manufacturer to supply goods. On the special facts of that case, the majority decision was that there was no offer and acceptance and no contract resulted. That decision should not be treated as an authority for the proposition that there can be no contract of sale under compulsion of a statute. It depends upon the facts of each case and the terms of the particular statute regulating the dealings whether the parties have entered into a contract of sale of goods. Under Act XLV of 1961, a canegrower makes an offer to the occupier of the factory directly and the latter accepts the offer. The parties then make and sign an agreement in writing. There is thus a direct privity of contract between the parties. The contract is a contract of sale and purchase of cane, though the buyer is obliged to give this assent under compulsion of a statute. The State Legislature is competent to tax purchases of canes made under such a contract.

Mr. Setalvad submitted that there can be no levy of a purchase tax with reference to the tonnage of the cane. We cannot accept this contention. Usually the purchase tax is levied with reference to the price of the goods. But the Legislature is competent to levy the tax with reference to the weight of the goods purchased.

The contention of Mr. Chatterjee that a purchase tax must be levied with reference to the turnover only is equally devoid of merit. Where the purchase tax is levied on a dealer, the levy is usually with reference to his turnover, which normally means the aggregate of the amounts of purchase prices. But the tax need not necessarily be levied on a dealer or by reference to his turnover. It may be levied on the occupier of a factory by reference to the weight of the goods purchased by him.

Mr. Chatterjee next submitted that a purchase tax must be levied on goods generally, and there can be no purchase tax with reference to their subsequent use, consumption or sale. He based his argument on paragraphs 17 to 20, Chapter III, Volume III of the Report of the Taxation Enquiry Committee. There, the Committee while discussing the comparative merits of sales tax in relation to customs, excise and octroi, pointed out that sales tax was a major source of revenue and could be applied to the generality of goods, while customs, excise and octroi, could be applied to only a limited portion of the industrial output of the country. The Committee did not express any opinion on the scope of List II, Entry 54. Under that Entry, the State Legislature is not bound to levy a tax on all purchases of cane. It may levy a tax on purchases of cane required for use, consumption or sale in a factory. The Legislature is competent to tax and also to exempt from payment of tax sales or purchases of goods required for specific purposes. Other instances of special treatment of goods required for particular purposes may be given. Section 6 and Schedule I, item 23 of the Bombay Sales Tax Act, 1946 levy tax on fabrics and articles for personal wear. Section 2 (*j*) (*d*) (*ii*) of the Central Provinces and Berar Sales Tax Act, 1947 exempts sales of goods intended for use by a registered dealer as raw materials for the manufacture of goods.

Mr. Chatterjee submitted that the tax levied under section 21 was a use tax and referred to *McLeod* v. *Dilworth & Co*[1]. and *C. G. Naidu & Co.* v. *State of Madras*[2]. He argued that the State Legislature could not levy a use tax which was

1. 322 U.S. 327: 88 L. Ed. 1305.
2. (1952) 2 M.L.J. 614 : A.I.R. 1953 Mad. 116, 127-128.

essentially different from a purchase tax. The assumption of Counsel that section 21 levies a use tax is not well-founded. The taxable event under section 21 is the purchase of goods and not the use or enjoyment of what is purchased. The constitutional implication of a use tax in American law is entirely irrelevant. The observation in the Madras case that the *Explanation* to Article 286 (1) (*a*) of the Constitution conferred a power on the State Legislature to levy a use tax is erroneous. The *Explanation* fixed the situs of certain sales. It did not confer upon the legislature any power to levy a use tax.

To appreciate another argument of Mr. Chatterjee, it is necessary to refer to a few facts. It appears that paragraph 21 of the Bill published in the Gazette on 3rd March, 1960 preliminary to the passing of Act XLV of 1961 provided for a levy of a cess on the entry of cane into the premises of a factory for use, consumption or sale therein. On 13th December, 1960, this Court in *Diamond Sugar Mills Ltd. and another* v. *The State of Uttar Pradesh and another*[1], struck down a similar provision in the U.P. Sugarcane Cess Act, 1956 on the ground that the State Legislature was not competent to enact it under Entry 52, List II as the premises of a factory was not a local area within the meaning of the Entry. Having regard to this decision, paragraph 21 of the Bill was amended and section 21 in its present form was passed by the State Legislature. The Act was published in the Gazette on 30th December, 1961. Mr. Chatterjee submitted that in this context the levy under section 21 was really a levy on the entry of goods into a factory for consumption, use or sale therein. We are unable to accept this contention. As the proposed tax on the entry of goods into a factory was unconstitutional, paragraph 21 of the original Bill was amended and section 21 in its present form was enacted. The tax under section 21 is essentially a tax on purchase of goods. The taxable event is the purchase of cane for use, consumption or sale in a factory and not the entry of cane into a factory. As the tax is not on the entry of the cane into a factory, it is not payable on cane cultivated by the factory and entering the factory premises.

Mr. Setalvad submitted that section 21 impeded free trade, commerce and intercourse and offended Article 301 of the Constitution and relied on the decision in *Firm A. T. Mehtab Majid & Co.* v. *State of Madras*[2]. In that case, the Court held that rule 16 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 discriminated against imported hides or skins which had been purchased or tanned outside the State by levying a higher tax on them and contravened Article 304 (*a*) of the Constitution. At page 442, Raghubar Dayal, J., said:

> "It is therefore now well settled that taxing laws can be restrictions on trade, commerce and inter-course, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304 (*a*)."

That case decides that a sales tax which discriminates against goods imported from other states may impede the free flow of trade and is then invalid unless protected by Article 304 (*a*). But the tax levied under section 21 does not discriminate against any imported cane. Under section 21, the same rate of tax is levied on purchases of all cane required for use, consumption or sale in a factory. There is no discrimination between cane grown in the State and cane imported from outside. As a matter of fact, under the Act the factory can normally buy only cane grown in the factory Zone. A non-discriminatory tax on goods does not offend Article 301 unless it directly impedes the free movement or transport of the goods. In *Atiabari Tea Co. Ltd.* v. *The State of Assam and others*[3]. Gajendragadkar, J., speaking for the majority said:

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1. (1961) 1 S.C.J. 652 : (1961) 3 S.C.R. 242. S.C.R. (Supp.) 435 : A.I.R. 1963 S.C. 928.
2. (1964) 1 S.C.J. 355: (1964) 1 M.L.J. (S.C.) 115 : (1964) 1 An. W.R. (S.C.) 115 : (1963) 2 S.C.R. (Supp.) 435 : A.I.R. 1963 S.C. 928.
3. (1961) S.C.R. 809, 860-61: A.I.R. 1961 S.C. 232.

"We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement?..........It is the free movement of the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part 13."

This interpretation of Article 301 was not dissented from in *Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*[1]. Normally, a tax on sale of goods does not directly impede the free movement or transport of goods. Section 21 is no exception. It does not impede the free movement or transport of goods and is not violative of Article 301.

Mr. Setalvad next submitted that section 21 offended Article 14 of the Constitution in several ways. It was argued that section 21 read with section 2 (*e*) discriminated between producers of sugar using the vacuum pan and open pan processes. Under section 21, as it stood before its amendment by Act IV of 1967, tax was levied on purchases of cane by factories producing sugar by means of vacuum pans but purchases of cane by khandasari units producing khandasari sugar by the open pan process were entirely exempt from that tax. Even the amended section 21 levies a lower rate of tax on the purchases of cane by khandasari units. It was also argued that there was dscrimination in favour of producers of jaggery by exempting their purchases of cane from payment of the tax. But the affidavits filed on behalf of the respondents show that factories producing sugar by means of vacuum pans and khandasari units producing sugar by the open pan processes form distinct and separate classes. The Industry using the vacuum pan process is in existence since 1932-33. No tax was levied on this industry until 1949. In 1949 when the industry became well established, tax was levied on it for the first time by section 14 of the Madras Sugar Factories Control Act, 1949. The Khandasari units carry on a small scale industry. They are of recent origin in the State of Andhra Pradesh. Until 1967, this industry was exempt from the levy. When the industry came to be somewhat established by 1967 a smaller rate of tax was levied on it. In 1965-66, factories adopting the vacuum pan process bought over 32 lakh tonnes of cane while the khandasari sugar units in the State bought about 2.70 lakh tonnes of cane. The manufacture of jaggery has no resemblance to the manufacture of sugar by the vacuum pan or the open pan system. It is a cottage industry wherein individual cane growers process their cane into jaggery and market it as a finished product. Having regard to the affidavits, we are satisfied that the differential treatment of the factories producing sugar by means of vacuum pans, khandasari units producing sugar by the open pan process and cane-growers using cane for the manufacture of jaggery is reasonable and has a rational relation to the object of taxation. There are marked differences between the three classes of users of cane and their capacity to pay the tax. The legislature could reasonably treat the three sets of users of cane differently for purposes of levy.

It was next argued that the power under section 21 (3) to exempt new factories and factories which in the opinion of the Government have substantially expanded was discriminatory and violative of Article 14. We are unable to accept this contention. The establishment of new factories and the expansion of the existing factories need encouragement and incentives. The exemption in favour of new and expanding factories is based on legitimate legislative policy. The question whether the exemption should be granted to any factory, and if so, for what period and the question whether any factory has substantially expanded and if so, the extent of such expansion have to be decided with reference to the facts of each individual case. Obviously it is not possible for the State Legislature to examine the merits of individual cases and the function was properly delegated to the State

1. (1963) 1 S.C.R. 491, 533: A.I.R. 1962 S.C. 1406.

Government. The Legislature was not obliged to prescribe a more rigid standard for the guidance of the Government. We hold that section 21 does not violate Article 14.

The petitioner in Writ Petition No. 101 of 1967 raised the contention that it was a new factory and that the Government of Andhra Pradesh should have exempted it from payment of tax under section 21 (3) (*a*). The contention was controverted by the respondents. The affidavits do not give sufficient materials on the point, nor is there any prayer in the petition for the issue of a *mandamus* directing the State Government to grant the exemption. In the circumstances, we do not think it fit to express any opinion on the matter. It will be open to the petitioner in Writ Petition No. 101 of 1967 to raise this contention in other proceedings.

In the result, the petitions are dismissed with costs, one hearing fee.

S.V.J. ——— *Petitions dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, S. M. SIKRI AND C. A. VAIDIALINGAM, JJ.

Maneklal Jinabhai Kot .. *Appellant**

v.

The State of Gujarat, etc. .. *Respondents.*

Factories Act (LXIII of 1948), section 101—Scope and applicability.

It is no doubt true that the manager or occupier of a factory who is charged with an offence punishable under the Factories Act, *e.g.*, contravention of section 63 of the Act, has a right under section 101 of the Act to bring before the Court the persons who according to him are the actual offenders. But before a conviction of those persons, so brought before the Court, can be made for the offences concerned, the manager or occupier of the factory who will be primarily liable for the due observance of the provisions of the Act, will have to prove to the satisfaction of the Court (*i*) that he has used due diligence to enforce the execution of the provisions of the Act and (*ii*) that such other person committed the offence in question, without his knowledge, consent or connivance.

Under the law a duty is cast on the occupier or manager of a factory to comply with the peremptory provisions of the Factories Act. Section 101 enables such a person to save himself from liability if he proves that he is not the real offender but some other person. If the requirements of the section are satisfied and the manager or occupier discharges the burden of proof cast on him by the section he should be absolved from all liability.

Appeals by Special Leave from the Judgment and Order dated the 4th February, 1964 of the Gujarat High Court in Criminal Appeals Nos. 135 to 138 of 1962 and Criminal Revision Applications Nos. 176 to 179 of 1963.

Purshottam Tricumdas, Senior Advocate (*R. Gopalakrishnan*, Advocate, with him), for Appellant (In all the Appeals).

Y. L. Tenaja, Advocate and *S. P. Nayyar*, Advocate for *R. H. Dhebar*, Advocate, for Respondent No. 1 (In all the Appeals).

The Judgment of the Court was delivered by

Vaidialingam, J.—These appeals, by Special Leave, are directed against the judgment of the Gujarat High Court, confirming the conviction, by the City Magistrate, Ahmedabad, of the appellant of an offence under section 92 of the Factories Act, 1948 (Act LXIII of 1948) (hereinafter called the Act), for breach of section 63 of the said Act, and cancelling a rule issued by it, to respondents 2 and 3, herein, to show cause against the order of discharge passed by the trial Court.

* Crl. Appeal Nos. 198 to 205 of 1964. 30th January, 1967.

The appellant was the Manager of the Saranpur Cotton Manufacturing Co., Ltd., Mill No. 2. The Inspector of Factories, Ahmedabad, found, on a visit to the factory concerned, at 3 A. M. on 26th May, 1961, certain workers actually working in the stamping department, at that time. According to the register of workers, maintained by the factory, in the form of attendance register, those workers belonged to Group II, Relay II. According to the notice of periods of work, displayed in the factory, the period of work for Group II, Relay II, was from 4 P. M. to 8 P. M. and from 8-30 P. M. to 1-00 A. M. According to the Inspector, the workers concerned were doing work at 3 A. M. on the said date, otherwise than in accordance with the notice of periods of work displayed in the factory and, entries made in the register of adult workers, and, therefore, there has been a contravention of the provisions of section 63 of the Act, punishable under section 92 thereof. Inasmuch as several workmen were concerned, the Inspector had filed a group of 4 complaints, against the appellant, on 4th August, 1961, before the City Magistrate, Ahmedabad.

On receiving summons from the Magistrate's Court, the appellant, who was, admittedly, the Manager of the Mill concerned, filed on 5th October, 1961, in his turn, a complaint before the Magistrate, under section 92, read with section 101 of the Act. To that complaint, respondents 2 and 3 were impleaded as accused. According to the appellant, about 2,400 workers are employed in the Mill, of which he is the Manager ; and the Mill consists of several departments, with competent heads, having been put in charge of each department. The appellant stated that the management had instructed all the departmental heads to comply with the provisions of the Act. He referred to the fact that he had specifically warned the various heads of departments against double employment. He also averred that the second respondent was the Salesman of the Mill, for about twelve years, and that he was in charge of some departments of the Mill, including the stamping department. The third respondent was a Supervisor in the stamping department and was in exclusive charge of the said department. The appellant further averred that the stamping department of the Mill was under the exclusive control of accused No. 1, on 26th May, 1961, and that it was in the sole charge of accused No. 2 at 3 A. M. on 26th May, 1961. Therefore, he alleged, that respondents 2 and 3 were responsible for allowing the concerned workmen to work at 3 A. M. in the stamping department of the Mills, on 26th May, 1961, contrary to the notice of periods of work displayed in the factory. Therefore, he averred, that those two respondents were the actual offenders who had violated section 63 and thus committed an offence under section 92 of the Act, by so employing those workers, referred to in the Factory Inspector's report. The appellant further stated that he was not present in the Mills when the said offence was committed by respondents 2 and 3, and that he had used due diligence to enforce the execution of the Act ; and that respondents 2 and 3, who were the accused in his cross-complaint, had committed the offences in question, without his knowledge, consent or connivance. Therefore he prayed for an inquiry into his allegations and to hold respondents 2 and 3 guilty of the offence of violation of the provisions of section 63 of the Act.

Before we go into the further proceedings that took place before the Magistrate, it is desirable to refer to some of the material provisions of the Act, *viz.*, sections 63, 92 and 101. Those sections are as follows :

"63. No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made beforehand against his name in the register of adult workers of the factory.

92. Save as is otherwise expressly provided in this Act and subject to the provisions of section 93, if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rule made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both, and if the contravention is continued after conviction, with a further fine

which may extend to seventy-five rupees for each day on which the contravention is so continued.

101. Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days' notice in writing of his intetion so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge ; and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the Court—

(*a*) that he has used due diligence to enforce the execution of this Act, and

(*b*) that the said other person committed the offence in question without his knowledge, consent or connivance,—

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence :

Provided that in seeking to prove as aforesaid, the occupier or manager of the factory, as the case may be, may be examined on oath, and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of the person he charges as the actual offender and by the prosecutor....."

* * * * * *

There is no controversy, in this case, that the appellant is the Manager of the factory concerned and he is the person who has been charged with having committed an offence punishable under the Act. It was, when such a complaint was made against him that he, in turn, filed on 5th October, 1961, the cross-complaint against respondents 2 and 3, which has been referred to earlier. There is also no controversy that he has complied with the requirement regarding the giving of notice, as contemplated under section 101.

In this case, it has also been admitted that the workers, referred to in the complaint filed by the Factory Inspector, have been employed at 3 A. M. on 26th May, 1961, in the stamping department of this factory, contrary to the provisions of section 63 of the Act, and, therefore, the commission of the offence with which the appellant was charged, has also been proved. Under those circumstances, it is open to the Manager of the factory, in this case the appellant, to have recourse to the provisions of section 101 of the Act, by complaining against persons who, according to him, are the actual offenders and bring them before the Court. But, before a conviction of those persons, so brought before the Court, can be made for the offences concerned , the appellant will have to prove to the satisfaction of the Court (*i*) that he has used the due diligence to enforce the execution of the provisions of the Act ; and (ii) that such other person committed the offence in question, without his knowledge, consent or connivance. It must also be noted that the appellant, in seeking to prove these circumstances, can be examined on oath and that he and any other witness, whom he places before the Court in his support, shall be subject to cross-examination, on behalf of the person he charges as the actual offender, and also by the Public Prosecutor. We are specially referring to this aspect, because, we may have to consider the question as to whether, either respondents 2 and 3, whom the appellant charges as being the actual offenders, or, the prosecutor in this case, *viz.*, the Factory Inspector, has established by cross-examination of the appellant that he has not proved the two essential conditions mentioned in clauses (*a*) and (*b*) of section 101.

Reverting back to the further proceedings before the Magistrate, summons were issued to respondents 2 and 3, on the cross- complaint filed by the appellant, on 5th October, 1961. On 1st December, 1961, the appellant pleaded not guilty

to the charge levelled against him by the Factory Inspector. He stated that he had not committed any breach of section 63 of the Act, and he specifically requested that the complaint filed by him against respondents 2 and 3 herein, who are the Salesman and Supervisor, respectively, be enquired into by the Court.

The second respondent, Bachubhai, on the same day, in answer to the charge levelled against him, by the appellant, that he and the third respondent were liable for the breach of provisions of section 63 of the Act for permitting the concerned workers to work at 3 A. M. on 26th May, 1961, pleaded guilty before the Magistrate. On the same day, he had filed a written statement, pleading guilty to the allegations made against him in the cross-complaint, and expressing regret for having committed a breach of the Act. He also admitted that he was in exclusive charge of the stamping department, on 26th May, 1961. He further averred that the 3rd respondent approached him, on 25th May, 1961, and represented that it was quite necessary to work a third shift in the stamping department from 1 A. M. on 26th May, 1961, in view of heavy accumulation of work. He further stated that he allowed the third respondent to work a third shift but by employing new workers, and that it was only on 27th May, 1961, that he came to know that the third respondent had employed the same workers in the third shift also and that he took him to task. He categorically stated that he had not informed the appellant about the proposed working of the third shift on 26th May, and that it was without the knowledge, consent or connivance of the appellant, that this breach was committed. He admits that the appellant had specifically warned him against double employment. Ultimately, he pleaded, for being let off, with a nominal fine.

Similarly, the third respondent, who appeared before the Court, on the same day, in answer to the same charge, pleaded guilty; and he also filed a written statement. In the written statement, he stated that he was the Stamping Supervisor of the Mill, on the relevant date and that due to accumulation of work in the stamping department, it was found necessary by him, to have a third shift on the morning of 26th May, 1961. He states that the 2nd respondent permitted him to start a third shift after engaging new workers. But, as new workers were not available on that date, the workers in the second shift were engaged by him ; and he accepts that, by doing so he has committed an offence, by mistake. He also categorically admits that he has not taken the permission of the appellant, for starting the said third shift and that it was done without the knowledge of the appellant. He also, ultimately, pleaded for being penalised, by imposing a small amount of fine.

On the same date, the Factory Inspector, has given evidence as P.W. 1. He has spoken to the fact that at the time of his visit at 3 A.M., on 26th May, 1961, he found, in the stamping department of the Mill, of which the appellant was the Manager, the concerned adult workmen working and that their employment was contrary to the hours of work prescribed for them in the notice put up in the factory. He has further stated that the appellant was not present in the Mill at the time of his inspection and that, on the other hand, respondent No. 3, the Supervisor, was there.

In cross-examination, he has referred to the fact that the Mill employs about 2,400 workers and that there are several departments in the Mill and that heads are appointed for each department. Though he has stated that he does not know, if the Manager has given instructions to the heads of the departments to comply with the provisions of the Act, when the notices, Exhibits 9 to 12, were shown to him, he accepted that those notices had been given by the appellant. He has also stated that, generally, the Salesman is the head of the Cloth department, including the Stamping department. Pausing here for a minute, we may state that this answer of the witness will show that the second respondent, who was the Salesman, is the head of the Cloth Department, including the Stamping department and that the statement of the appellant, in that regard, stands corroborated.

The appellant has given evidence, on 6th December, 1961. In his evidence, he has referred to the fact that he attends to his duties from 11-30 A.M. to 6-30 P.M., and that there are about 2,400 workers employed in the Mill, which consists of several

departments, and for each of which a head had been appointed, by the management. He has referred to the fact that provision is made in the terms and conditions of appointment that the heads of departments are to abide by the provisions of the Act. He speaks to the fact that he has given instructions to the heads of departments, from time to time, to follow the provisions of the Act and, in particular, he refers to Exhibits 9 to 12, beginning from 30th January, 1957 and ending with 30th November 1960, insisting upon the heads of departments to comply strictly with the provisions of the Act and warning against double employment. He has deposed that the second respondent was in charge of the Cloth department, of which the Stamping department formed part. The third respondent, according to him, is the Supervisor of the Stamping department and that when he came to know about the breach alleged against him, on 27th May, 1961, he enquired into the matter and suspended the third respondent for 4 days and severely warned the second respondent after receiving his explanation. He has also stated that he did not receive any information from either the 2nd respondent or the 3rd respondent, that there was to be a third shift on the morning of 26th May, 1961, and that he had not allowed any worker to work in the third shift after they had worked in the second shift. He has also stated that he did not give any consent to the working of those workers and he had no knowledge at all about it. In cross-examination, he has stated that he goes round the entire mill, sometimes daily, and on some occasions, on the second or third day. He has denied a suggestion that he was aware that the second respondent had asked the third respondent to make the same workers work during the third shift.

The point to be noted, in the evidence of the Factory Inspector, and of the appellant, is that the Inspector admits that the appellant was not present at the time of his inspection and that the third respondent was present and that the 2nd respondent is the Salesman and the 3rd, the Supervisor. He accepts that particular persons have been appointed in the Mill as heads of the various departments and that the Salesman is generally the head of the Cloth department, including the Stamping Department. He also admits that the appellant has issued notices, exhibits 9 to 12, warning the heads of departments to strictly comply with the provisions of the Act and also stating that there should be no double employment. The appellant's evidence, that the second respondent was incharge of the Cloth Department, at the material time, and that he has been warned against double employment on several occasions, and that he was not aware of the employment of the workers concerned, in the third shift, on the morning of 26th May, 1961, have not been challenged. The answers given by the appellant that he did not give his consent to the working of those concerned workers and that he has no knowledge about their having worked at the material time, is not also seriously challenged. More than that, there is absolutely no suggestion made to the appellant that there is any sort of collusion between him and respondents 2 and 3, and that the latter are merely admitting the offence in the cross-complaint by the appellant to oblige him. Respondents 2 and 3 have categorically admitted the offence mentioned against them in the cross-complaint ; and the appellant has not been cross-examined by them, as they are entitled to, under the first proviso to section 101. We are particularly referring to some of these aspects, because, in our opinion, those are all matters which should have been properly taken into account, by the Magistrate and the High Court, for considering the question as to whether the appellant has proved, to the satisfaction of the Court, the two essential matters dealt with by clauses (*a*) and (*b*) of section 101 of the Act.

On this state of evidence, the learned Magistrate held that the appellant cannot be considered to have established either that he has used due diligence to enforce the execution of the Act as required under clause (*a*) of section 101, or that respondents 2 and 3 committed the offence, in question, without his knowledge, consent or connivance. According to the trial Court, from the mere fact that respondents 2 and 3 have pleaded guilty, it cannot be said that they have committed the breach without the connivance of the appellant. The Magistrate, while realising that there was no direct evidence of consent or knowledge on the part of the appellant, yet, from the fact that the wages were paid by the Mill to those workers, held that it could be safely inferred that the offence must have taken place on the material date

with the consent, knowledge or connivance of the accused. On these findings, the Magistrate discharged respondents 2 and 3 and found the appellant guilty of having violated the provisions of section 63 of the Act and, as such, convicted him under section 92, and ordered him to pay a fine of Rs. 400 or, in default, suffer simple imprisonment for 3 weeks.

The appellant filed appeals before the Gujarat High Court against the judgment of the Magistrate, challenging his conviction. It is seen that the High Court issued notices to the 2nd and 3rd respondents, to show cause why the order of discharge passed by the Magistrate, for offences under sections 63, 92 and 101 of the Act, should not be set aside ; and those references have been numbered, in the High Court, as Criminal Revision Applications Nos. 176 to 179 of 1963. All the matters were heard together and disposed of by a common judgment by the High Court. The learned Judges of the High Court have upheld the judgment of the Magistrate, holding the appellant guilty. In view of this direction, the High Court, discharged the rule issued to respondents 2 and 3.

The learned Judges are also of the view that the appellant cannot be considered to have established that he had used due diligence to enforce the execution of the Act. The reliance which has been placed by the appellant regarding the circulars issued by him, evidenced by Exhibits 9 to 12, has not impressed the learned Judges. Though there is no separate and independent discussior as to whether the appellant has been able to establish that respondents 2 and 3 have committed the offences, without his knowledge, consent or connivance, there is a general finding by the learned Judges that the fact that the appellant had specifically mentioned, in his circulars issued, about double employment and the fact that the wages for the workers concerned have been met by the factory, will lead to the inference that the employment of the workers, which is the subject of the charge, could not have been made without the knowledge, consent or, in any case, the connivance of the accused. There is, again, no separate consideration, by the learned Judges, about the plea of guilt made by respondents 2 and 3. Ultimately, holding that the appellant had not proved that he has used due diligence to enforce the execution of the Act and that respondents 2 and 3 have committed the offence without his knowledge, consent or connivance, the learned Judges dismissed the appeals filed by the appellant against his conviction and also cancelled the rule issued to respondents 2 and 3. This comprehensive order, passed by the High Court, confirming the order of the Magistrate convicting the appellant, and discharging the rule issued to respondents 2 and 3 in the criminal revisions and dismissing the said revisions, is the subject of attack in these proceedings.

Mr. Purshottam Tricumdas, learned Counsel for the appellant, has urged that the entire approach made by both the Magistrate and the learned Judges of the High Court, for holding the appellant guilty of the offence, with which he was charged, is erroneous in law. Counsel also urged that, in this case, the appellant has let in unchallenged and uncontroverted evidence to establish the two essential matters referred in clauses (*a*) and (*b*) of section 101 of the Act and these aspects have not been properly considered in law. Counsel also pointed out that, without adverting to the material evidence on record, the inference drawn by the Court that the appellant has not proved those matters, is totally opposed to the evidence adduced in the case. In fact, Counsel pointed out, that the evidence adduced by the appellant to establish that he has used due diligence to enforce the execution of the Act and that respondents 2 and 3 committed the offence in question without his knowledge, consent or connivance, apart from not being challenged in cross-examination, has really been supported by the evidence given by the Factory Inspector, as P.W. 1, and the written statements filed by respondents 2 and 3. In short, according to the Counsel, section 101 of the Act has not been properly applied.

On the other hand, Mr. Taneja, Counsel for the State of Gujarat, has pointed out that the findings arrived at by both the Magistrate and the learned Judges of the High Court are, on facts, as against the appellant, which findings have been arrived at, after an appreciation of the material evidence adduced in the case.

We are not satisfied that there has been a correct legal approach made either by the Magistrate or the High Court, to a decision on the plea recorded by the appellant, especially with regard to matters referred to in section 101 of the Act. It is not necessary for us, in this case, to consider, in any great detail, the ingredients of an offence under section 63 of the Act, because a violation of the said provision is admitted by the appellant, as well as by respondents 2 and 3. The appellant has invoked section 101. In considering this provision, it is necessary to refer to the observations made, by this Court in *State of Gujarat* v. *Kansara Manilal Bhikhalal*[1] regarding the scope of section 101 of the Act. In that case, the manager of a factory was charged with the violation of section 63 of the Act. He raised several pleas in answer to that charge, but he did not have recourse to section 101 of the Act. Ultimately, the manager was convicted under section 63 of the Act, read with section 94. Hidayatullah, J., observed, with reference to section 101, as follows at page 662:

> "Where an occupier or a manager is charged with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on proof of the commission of the offence by such person the occupier or the manager is absolved from liability. This shows that compliance with the peremptory provisions of the Act is essential and unless the occupier or manager brings the real offender to book, he must bear the responsibility......It is not necessary that *mens rea* must always be established as has been said in some of the cases above referred to. The responsibility exists without a guilty mind. An adequate safeguard, however exists in section 101 analysed above and the occupier and manager can save themselves if they prove that they are not the real offenders but who, in fact, is. No such defence was offered here."

From the observations quoted above, it is clear that there is a duty cast, under the Act, upon the occupier or manager, to comply with the peremptory provisions of the Act; but, under section 101, when the manager or occupier is charged with an offence, he is entitled to make a complaint, in his own turn, to establish facts mentioned in the said section ; and, if he is able to establish that it was such other person, who has committed an offence, and satisfies the other requirements of the said section, the manager or occupier is absolved from all liability. It is also emphasized that an adequate safeguard has been provided, under section 101, under which, in circumstances mentioned therein, the occupier or manager can save himself, if he proves that he is not the real offender, but some other person, charged by him, is.

Applying the principles referred to above, the approach made by the trial Court, and by the High Court, in this case, in our opinion, is erroneous. We have already indicated that the employment of the workmen concerned, referred to in the complaint filed by the Factory Inspector, in the factory, and at the material time, is established ; and that clearly shows that the commission of the offence, with which the appellant has been charged, has been proved. Without anything else, the appellant will have to be found guilty. But the only question is, whether he has been able to save himself, by establishing that he is not the real offender, and that respondents 2 and 3 have committed the offence. Even here, we have already indicated with reference to the pleas raised by respondents 2 and 3, before the Magistrate, in answer to the cross-complaint against them and the written statements filed by them, that they have pleaded guilty to the charge. Therefore, in our opinion, the appellant can also be considered to have established that the offence was committed by respondents 2 and 3. But, it is further necessary for the appellant to establish the two essential facts mentioned in section 101 of the Act, *viz.*, (i) that he has used due diligence to enforce the execution of the Act and (ii) that respondents 2 and 3 committed the offence in question without his consent, knowledge or connivance.

With regard to the first, the question is as to whether the appellant has established that he has used due diligence to enforce the execution of the Act. The appellant has stated, in his evidence, that each department in the Mill has got a head appointed by the Management and each department has sections and there are heads for

1. (1964) 7 S.C.R 656: (1965) M.L.J. (Crl) 615: (1965) 2 S.C.J. 385.

those sections also, and that they have been required to comply with the provisions of the Act. He has also stated that, on the material date, the 2nd respondent was a Salesman-in-charge of the Stamping department, which was part of the Cloth Department, and that he had been directed to guard against double employment in the Mill. He has spoken to the fact that the third respondent was the Supervisor and was in exclusive charge of the Stamping department at the material time. This evidence of the appellant has not been, in any manner controverted by the prosecution. There is no suggestion by the prosecution that the division of the various departments, is, in any manner, fictitious or a make-believe affair and that those heads of departments did not have effective control or check over the departments in their charge. On the other hand, the Factory Inspector has admitted, as P.W. 1, that there are several departments in this Mill and that heads are appointed to be in charge of each department. He has also admitted that the Salesman is the head of the Cloth department, including the Stamping department. Both respondents 2 and 3, have, in their statements, stated that the 2nd respondent was in-charge of the department, at the material time. It is also in evidence, which is not controverted, that the appellant has issued various circulars from time to time, evidenced by Exhibits 9 to 12, to the various heads of departments, insisting upon the strict compliance with the provisions of the Act ; and, in particular, he has also warned the departmental heads against double employment. Though the Factory Inspector pretended ignorance about the appellant having issued these circulars, ultimately, he has accepted, in his evidence, that these notices have been issued by the appellant. We do not find that either the trial Court, or the High Court, has disbelieved this evidence of the appellant, nor have they held that these circulars are only a make-believe affair. Under these circumstances, in our opinion, the proper conclusion to be drawn is that the appellant has used due diligence to enforce the execution of the Act, in which case, clause (*a*) of section 101 is satisfied.

We shall then consider the question as to whether the appellant has established that respondents 2 and 3 are the persons who committed the offence, in question, without his knowledge, consent or connivance. So far as that is concerned, we have already referred to the nature of the evidence given by the Factory Inspector, as well as the appellant ; and we have also referred to the matters contained in the written statements filed by respondents 2 and 3. The Factory Inspector has accepted that the appellant was not in the Mill at the time of his inspection and that respondent 3 was there at that time. The appellant has given evidence to the effect that he did not allow any worker to work in the third shift, on the material date, and that he did not receive any information from respondents 2 and 3 about the proposal to have a third shift on that date. He has stated that he came to know about the occurrence only on 27th May, 1961, and that, immediately thereafter he took action against respondents 2 and 3. These answers have not been challenged in cross-examination of the appellant. More than that, respondents 2 and 3, who are specifically charged by the appellant, in his cross-complaint, of having committed the offence, did not cross-examine the appellant at all. On the other hand, they categorically admitted, in their pleas in answer to the charge before the Court, at well as in the written statements filed by them, that they are guilty of the offence. Both of them have categorically admitted their guilt and they have stated that the appellant was not informed by either of them about the proposed working of the third shift on the morning of 26th May, 1961. They have also stated that the working of the third shift was without the knowledge, consent or connivance of the appellant. Both of them have stated that the appellant had specifically warned them against double employment. These statements, made by respondents 2 and 3 and the evidence given by the appellant which, as we have already referred to, have not been challenged by the prosecution and they, in our opinion, clearly establish that the offence was committed by respondents 2 and 3 without the knowledge and consent of the appellant. There is also no evidence from which it is possible to come to the conclusion that the offence has been committed by respondents 2 and 3, with the connivance of the appellant, in the sense of passive co-operation, by the appellant, as by consent or pretended ignorance in the wrong doing. Therefore, we are satis-

fied that the appellant has proved that respondents 2 and 3 committed the offence, in question, without his knowledge or consent and that they did so without his connivance either, in which case, clause (*b*) of section 101, is also satisfied.

From what is stated above it follows that the conviction of the appellant for an offence, under section 92 of the Act, for breach of section 63, cannot stand. We have already stated that the Magistrate discharged respondents 2 and 3 ; and that the High Court issued notices to them to show cause as to why the said order of discharge should not be set aside. These were numbered as Criminal Revision Applications Nos. 176 to 179 of 1963. In view of the fact that the appellant's conviction was being confirmed, the High Court discharged the rule, issued by it, to respondents 2 and 3. But, in the view that we now take, these respondents have to be convicted, in accordance with the provisions of section 101 of the Act. The appellant has also filed appeals, in this Court, impleading these two respondents as parties, challanging the order of discharge passed in their favour. On the basis of our above findings, the appellant has to be discharged from any liability under the Act, in respect of the offence charged ; and respondents 2 and 3 must be held to have committed the offence in question, by violating the provisions of section 63 of the Act. In consequence, respondents 2 and 3 are found guilty of violating the provisions of section 63 and are, accordingly, convicted under section 92 of the Act ; and each of them is sentenced to pay a fine of Rs. 100 in default to undergo simple imprisonment for one week.

In the result, all the appeals are allowed and the conviction and sentence of the appellant are set aside and he is discharged from any liability under the Act, in respect of the offence with which he was charged. The order of discharge of respondents 2 and 3 is set aside and they are convicted and sentenced, as stated above. The fine if paid shall be refunded.

R.M. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.

Income-tax Officer, Tuticorin .. *Appellant**

v.

T. S. Devinatha Nadar, Etc. .. *Respondents.*

Income-tax Act (XI *of* 1922) (*as amended in* 1953), *section* 35 (5)—*Assessment of partners—Whether can be rectified on the basis of assessment or reassessment of firm—Scope of provision.*

Practice—Supreme Court—Decisions of Supreme Court—When can be overruled.

The respondents were partners of a registered firm carrying on business in gunnies. For the assessment year 1943-44 the firm was assessed to tax on 22nd January, 1946. On 24th January, 1946, the partners were assessed to tax for the same year after taking into consideration their share of profits in the firm. The Indian Income-tax Act, 1922, was amended by the Income-tax (Amendment) Act, 1953. The amending Act among other provisions incorporated section 35 (5) into the Act. Section 1 (2) of the amending Act provided that " subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952." On 11th September, 1952, the Income-tax Officer issued notice to the firm under section 34 of the Act requiring the firm to show cause why its assessment for the assessment year 1943-44 should not be re-opened and enhanced for the reasons mentioned in that notice. In the proceedings that followed the assessment of the firm was substantially enhanced on 30th May, 1959. Thereafter, proceedings against the respondents were

* C. As. Nos. 2154 to 2158 of 1966. 25th October, 1967.

initiated under section 35 (5) read with section 35 (1) as per notices dated 24th July, 1959. In those proceedings the assessment of the respondents for the assessment year 1943-44 was enhanced. The respondents challenged the validity of those proceedings in the High Court and got the orders quashed. On appeal to Supreme Court,

Held (*by majority*) : the orders of rectification passed by the Income-tax Officer are effective and binding on the respondents. There is nothing in section 35 (5) to show that the " completed assessment" of a partner in a firm must take place after the provision, *i.e.*, section 35 (5) was brought on the statute book. What is to take place to give rise to the power of rectification is the finding on the assessment or reassessment of the firm, etc. Sub-section (5) of section 35 becomes operative as soon as it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm that the share of the partner in the profit or loss of the firm had not been included in the assessment of the partner or if included was not correct. The completion of the assessment of the partner as an individual need not happen after 1st April, 1952. The completed assessment of the partner is the subject-matter of rectification and this may have preceded the above-mentioned date. Such completion does not control the operation of the sub-section.

Per *Hegde, J.* (*dissenting*) : the legislature used the expression " completed assessments" to distinguish that class of assessments from assessments which are final under the Act. By using that expression the legislature intended that the assessment of a partner should not be considered as a final assessment till the assessment of the firm becomes final. In other words, the partner's assessment would continue to be tentative till the company's assessment becomes final. Therefore the expression " completed assessment" can only apply to assessments of partners made on or after 1st April, 1952. Section 35 (5) neither expressly nor by necessary implication empowers the Income-tax Officer to reopen assessments which had become final. As the respondents' assessments had become final prior to 1st April, 1952, those assessments cannot be considered as "completed assessments" within the meaning of that word in section 35 (5) and consequently those assessments must be held to be outside the scope of that section.

Decisions of the Supreme Court should not be overruled excepting under compelling circumstances. It is only when the Supreme Court is fully convinced that public interest of a substantial character would be jeopardized by a previous decision the Supreme Court should overrule that decision. Every time the Supreme Court overrules its previous decision, the confidence of the public in the soundness of the decision is bound to be shaken.

Reconsideration of the decisions of the Supreme Court should be confined to questions of great public importance. In law finality is of utmost importance. Legal problems should not be treated as mere subjects for mental exercise. The Supreme Court must overrule its previous decisions only when it comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was *res integra.*

Appeals by Special Leave from the judgment and Order dated the 27th March, 1963, of the Madras High Court in Writ Petitions Nos. 1229 to 1233 of 1961.

S.K. Aiyer and *R.N. Sachthey*, Advocates, for Appellant (In all the Appeals).

T.A. Ramachandran, Advocate, for Respondents (In all the Appeals).

The Court delivered the following Judgments:

Mitter, J. (*for himself K.N. Wanchoo, C.J., R.S. Bachawat and V. Ramaswami JJ.*)—This group of five appeals by Special Leave arises out of a common order made under Article 226 of the Constitution of the High Court of Judicature at Madras. The appeals involve the interpretation of section 35 (5) of the Income-tax Act, 1922.

The facts in Civil Appeal No. 2154 of 1966 relevant for the disposal of the appeal, taken by way of sample, are as follows. The respondent along with his

four brothers were partners of a registered firm carrying on business in gunnies. The assessment of the firm for the year 1943-44 was completed on 22nd January, 1946, and the share income of each partner was determined at Rs. 8,265. The assessment of the respondent as individual was completed on 24th January, 1946, wherein was included his income from the partnership just noted. Subsequently, the assessment of the firm was re-opened by proceedings under section 34 (1) (*a*) of the Act and a sum of Rs. 90,000 was added to the income of the firm liable to be brought to tax. The notice under section 34 was issued on 11th September, 1952 and the re-assessment of the firm took place on 30th May, 1959. On 24th July, 1959, a notice under section 35 (5) of the Act was served on the respondent for rectification of his assessment as an individual. The rectification was ultimately ordered to be made on 31st August, 1959. The respondent applied to the High Court for quashing the said order.

When the matter came to be heard by the High Court of Madras, there were already three reported decisions of this Court bearing on the interpretation of section 35 (5) of the Act. In the last of these decisions, a doubt had been cast as to the correctness of the two earlier decisions but the High Court felt that the decision in *Second Additional Income-tax Officer* v. *Atmala Nagaraj*[1], being the second decision of this Court in point of time, was fully applicable to the cases before it and in that view of the matter the order of rectification was quashed. Hence these appeals.

Before taking note of the earlier decisions of this Court, it would be appropriate to consider the relevant provisions of the Income-tax Act and interpret them as if the matter were *res integra*. If the result leads to a conflict of decisions, we will have to examine the question as to whether the view taken in an earlier case should be adhered to. It is only when this Court finds itself unable to accept the earlier view that it would be justified in deciding these appeals in a different way.

The two sub-sections of section 35 which call for interpretation are transcribed as follows :

"35. *Rectification of mistake*.—(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33-A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee :

Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner or the Income-tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard :

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.

(2) to (4) * * * * * *

(5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct the inclusion of the share in the assessment or the correctness thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm.

(6) to (10) * * * * * *."

Section 35 (5) was brought on the statute book by the Income-tax (Amendment) Act (XXV of 1953). Section 1 (2) of the Act provided that :

"Subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952."

The Amendment Act contained provisions which show that some of the amendments introduced were to be effective from dates other than 1st April, 1952. Section 19 of the Act of 1953 introduced sub-sections (5), (6) and (7) of section 35 of the origi-

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1. (1962) 46 I.T.R. 609.

nal Act. Under sub-section (1) of section 35 the Income-tax authorities mentioned therein were empowered to rectify mistakes apparent from the record. Such power could, in the case of an Income-tax Officer, be exercised at any time within four years from the date of any assessment order passed by him on his own motion. The section however imposes a limitation in that the mistake must be in the record of the case itself. As a firm and the individuals composing it are separate entities for purpose of Income-tax Act, they are assessed separately. Under section 23 (5) (*a*) of the Act when the assessee is a registered-firm and its income has been assessed under sub-section (1), sub-section (3) or sub-section (4) of that section the income-tax payable by the firm itself has to be determined and the total income of each partner of the firm including therein his share of the firm's income, profits and gains of the previous year have to be assessed and the sum payable by him or the basis of such assessment has to be determined. Inasmuch however as a mistake discovered in the assessment of the firm was not a mistake apparent from the record of assessment of the individual partner, section 35 (1) did not enable the Income-tax Officer to rectify the assessment of the individual partner because of the discovery of the mistake in the assessment of the firm. The judgment of the Andhra Pradesh High Court in *Kanumarlapudi Lakshminarayana Chetty* v. *First Additional Income-tax Officer, Nellore*[1], wherein it was decided that when the mistake discovered in the assessment of the firm was not in the record of the individual partner section 35 (1) did not authorise the rectification of such mistakes was upheld by this Court in *The Income-tax Officer, Madras* v. *S.K. Habibullah, Madras*[2]. Section 35 (5) removes that difficulty. It expressly provides that where it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm under the provisions of the specified sections that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included is not correct, the inclusion of the share in the assessment or the correction thereof will be deemed to be a rectification of a mistake apparent from the record within the meaning of section 35 so as to make sub-section (1) of section 35 applicable to the case of a completed assessment of a partner in a firm. Whereas under section 35 (1) rectification is only possible within four years from the date of any assessment order or refund order passed by the Income-tax Officer, the starting point of computation of the period of four years under section 35 (5) is the date of the final order passed in the case of the firm.

The point which has been convassed in this case in favour of the respondent is that as the section was brought on the statute book on the 1st April, 1952, any mistake anterior to that date cannot be rectified. It was argued that the opening words of the section reading:

"Where in respect of any completed assessment of a partner in a firm"

go to show that only assessments completed after the introduction of the provision *i.e.*, on 1st April, 1952, were in the contemplation of the Legislature as proper subject for rectification. It was urged that according to the well known canons of construction legislation which impairs an existing right or obligation except as regards matters of procedure, is not to have retrospective operation unless such construction is clear from the terms of the Act itself. This argument was sought to be fortified by a reference to sub-section (2) of section 1 of the Income-tax Amendment Act of 1953 on the ground that the legislature was bringing this provision on the statute book as from an anterior date and consequently no greater retrospectivity should be given to it. "The general rule" as Halsbury puts it in Volume 36 (third edition), page 423 :

"........is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are *prima facie* propspective; and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

1. (1956) An.W.R. 243 : (1956) An.L.T. 798 : I.L.R. (1956) A.P. 301 : (1956) 29 I.T.R. 419 : A.I.R. 1957 A.P. 159.
2. (1962) 44 I.T.R. 809 : (1963) 1 M.L.J. (S.C.) 107: (1963) 1 An.W.R. (S.C.) 107 : (1963) 1 S.C.J. 535 : (1962) 2 S.C.R. (Supp.) 716: A.I.R. 1962 S.C. 218.

The law was also succinctly stated by Lord Hatherley, L.C. in *Pardo* v. *Bingham*,[1] where on the question as to whether a statute operated retrospectively it was said:

"In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated."

Applying the above principles, we find that the aim of the legislation was to bring into line the assessment of the individual partner with that of the firm. It was well-known that in many cases a firm's final assessment dragged on for years while the assessments of the individuals composing of it were completed long before the assessment of the firm itself because in the case of individuals the matter was fairly simple. It does not stand to reason that if the assessment of the firm is completed long after that of the individual by reason of proceedings under section 34 or otherwise, the discrepancy in the income of the partner as shown by the assessment of the firm and as an individual should continue or be left untouched and the obvious and logical course should be to rectify the assessment of the individual on the basis of the final assessment of the firm. Sub-section (5) of section 35 is only a step in that direct tion but the Legislature in its wisdom thought it best that assessments of individuals which had taken place before the final order in the assessment of the firm should not be disturbed except within four years therefrom. Under the Income-tax Act 1922, a final assessment could not be altered except under proceedings sanctioned by section 34 or section 35 of the Act within the limits of time thereby prescribed. Leaving aside for a moment the point of time when sub-section (5) came into the statute book, on a plain reading of the provision it appears to us that the legislature intended that the finding as to the non-inclusion of the proper share of the partner in the profit or loss of the firm in the assessment of the partner should excite the power or rectification. The power is to be exercised whenever "it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm." The subject-matter of rectification is the completed assessment of a partner in a firm. This is brought out by the use of the words "where in respect of any completed assessment of a partner in a firm". There is nothing in the section to show that such "completed assessment" must take place after the provision *i.e.*, section 35 (5) was brought on the statute book. What is to take place to give rise to the power of rectification is the finding on the assessment or re-assessment of the firm, etc. The finding alone must be made after the section comes into force. The finding is to be given effect to or made operative on the "completed assessment" of a partner. As the mischief sought to be rectified was the discrepancy between the income of the partner assessed as an individual and his income as computed on the assessment of the firm, the legislature must be held to have made the remedy applicable whenever the mischief was discovered. There would have been nothing unjust in making the power of rectification exercisable at any time after the discovery of the discrepancy but the legislature in its wisdom did not think that the power should be used except within a limited period of four years from the date of the final order.

This group of appeals has been referred to a larger Bench than one of three Judges before whom the matter was opened on 4th May, 1967 because of the earlier decisions of this Court. We now proceed to examine these decisions chronologically. In *The Income-tax Officer, Madras* v. *S.K. Habibullah*,[2] the facts were as follows. One Mohiuddin who was a partner in two registered firms submitted returns of his income incorporating therein the estimated share of losses in the two firms for the assessment years 1946-47 and 1947-48. The estimates of the assessee were accepted by the Income-tax Officer who completed the assessment for the two years on 20th February, 1950. The assessment of one of the firms for the same years was completed on 31st October, 1950, but the proportionate share of the assessee for the losses was computed at much smaller figures. The assessment of the other firm for 1947-48 was completed on 30th June, 1951 again for a smaller sum than that estimated by

1. L.R. 4 C. A. 735.
2. (1962) 44 I.T.R. 809: (1963) 1 M.L.J. (S.C.) 107: (1963) 1 An.W.R. (S.C.) 107: (1963) 1 S.C.J. 535: (1962) 2 S.C.R. (Supp.) 716: A.I.R. 1962 S.C. 918.

the assessee. The Income-tax Officer started rectification proceedings on 4th May, 1953, and ultimately passed an order for rectification on 27th March, 1954, after taking into account the share of the losses as computed in the assessment of the two firms. It will be noted at once that the finding about the incorrectness of the losses of the firm as estimated by the assessee as also the completion of his assessment preceded 1st April, 1952, and on the view of the section which we have taken it could not be made applicable at all. It was stated in express terms by this Court :

"The power to rectify assessment of a partner consequent upon the assessment of the firm of which he is a partner by including or correcting his share of profit or loss can therefore be exercised only in the case of assessment of the firm made on or after 1st April, 1952."

The decision in *Habibullah's case*[1], therefore in no way conflicts with the view of section 35 (5) which we have taken above. In passing, however, it may be noted that in *Habibullah's case*[1], a reference was made to sub-section (6) of section 35 which was introduced in the statute book by section 19 of the Amendment Act of 1953, at the same time as sub-section (5). There are certain words in sub-section (6) which are not to be found in sub-section (5) and on a contrast between the language used in the two sub-sections it was observed in *Habibullah's case* [1]:

"When the Legislature under clause (6) of section 35 expressly authorised rectification in the circumstances mentioned therein even if the assessment has been completed before the Indian Income-tax (Amendment) Act, 1953, and it made no such provision in clause (5), it would be reasonable to infer that the Legislature did not intend to grant to the revenue authorities a power to rectify assessments falling within clause (5) where the firm's assessment was completed before 1st April, 1952."

This reasoning was advanced before us in aid of the argument that sub-section (5) should have no retrospective operation beyond 1st April, 1952. We do not want to express any view as to the interpretation of sub-section (6) but in our opinion, sub-section (5) was clearly intended to give retrospective effect to final orders made in the case of the firm by incorporation of the result thereof in the case of the partner as an individual.

The second decision of this Court is that of *Second Additional Income-tax Officer* v. *Atmala Nagaraj*[2]. In this case the proceedings related to the assessment of the respondent for the assessment year 1950-51. The respondent in one of the appeals was assessed as an individual while in the other appeal the respondent was assessed as a Hindu undivided family. The original assessment was completed in both cases on 22nd January, 1952. The two assessees held shares in two registered firms and the shares from the profits of these firms were included in the assessable income of the two respondents. The assessments of the firms were completed by an order dated 16th October, 1954, when it was found that the aggregate shares of income from the two firms in the case of each of the respondents were more than that for what they had been assessed. After starting proceedings under section 35 an additional demand was made whereupon the respondents moved the High Court of Andhra Pradesh. After referring to *Habibullah's case*[1] and *K. Lakshminarayana Chetty's case*[3], it was said:

"The assessment of the respondents was a final assessment before 1st April, 1952, and sub-section (5) has not been made applicable to such assessment, either expressly or by implication. It has been given a limited retrospectivity from 1st April, 1952, and it was held by this Court in the cited case that it was not open to Courts to give more retrospectivity to it. Resort in this case could only be taken to the law as it stood before the introduction of sub-section (5), and as determined already by this Court, the record of the firm's assessment could not then be called in aid to demonstrate an error on the record of a partner's assessment........In our opinion, sub-section (5) could not be used in this case, and the decision of the High Court was right."

With very great respect, we find ourselves unable to concur. As we have already said, sub-section (5) becomes operative as soon as it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm that the share of the partner in the profit or loss of the firm had not been included in the assessment of the partner or if included was not correct.

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1. (1962) 44 I.T.R. 809 : (1963) 1 M.L.J. S.C.) 107 : (1963) 1 An.W.R. (S.C.) 107 : (1963) 1 S.C.J. 535 : (1962) 2 S.C.R. (Supp.) 716 : A.I.R. 1962 S.C 918.
2. (1962) 46 I.T.R. 609.
3. (1956) An.W.R. 243 : (1956) An.L.T. 798 : I.L.R. (1956) A.P. 301 : (1956) 29 I.T.R. 419 : A.I.R. 1957 A.P. 159.

The completion of the assessment of the partner as an individual need not happen after 1st April, 1952. The completed assessment of the partner is the subject-matter of rectification and this may have preceded the above mentioned date. Such completion does not control the operation of the sub-section. In the result, we find ourselves unable to concur in the decision or the reasoning in *Atmala Nagaraj's case*[1].

The last case in the series is that of *Ahmedabad Manufacturing and Calico Printing Co., Ltd.* v. *S.C. Mehta*[2]. In this case the Court had to consider sub-section (10) of section 35 which was introduced by section 19 of the Finance Act, 1956. The Bench hearing this appeal was composed of five Judges and two of them, S.K. Das and J.L. Kapur, JJ., took the view that *Habibullah's case*[3] had been correctly decided but that *Atmala Nagaraj's case*[1] might require re-consideration although they did not express any final opinion on that point. Sarkar, J. (as he then was) did not think that much assistance could be had from *Habibullah's case*[3] in the matter of interpretation of sub-section (10) of section 35. He said further:

> "There is nothing in *S.K. Habibullah's case*[3] to indicate that in the opinion of the learned Judges deciding it there were any words which would indicate that sub-section (5) was to have a retrospective operation. In my view, sub-section (10) contains such words."

The judgment of the two other Judges, Hidayatullah and Raghubar Dayal, JJ., was delivered by Hidayatullah, J., who dealt with the subject of retrospective operation of statutes elaborately and discussed *Habibullah's case*[3], at some length and expressed the view (at p. 125) that although the section mentioned the final order in the firm's assessment as the starting point " there was nothing to show that this new *terminus a quo* must be after 1st April, 1952, before sub-section (5) could be used ". According to Hidayatullah, J., " the words of the sub-section were entirely indifferent to this aspect ". The learned Judge was however careful to add that this must not be considered as his final opinion on sub-section (5). Any opinion of Hidayatullah, J., even with the above qualification merits the highest respect. After giving very anxious consideration to the views expressed by the learned Judge, we still hold that by sub-section (5) of section 35 the legislature intended that rectification should be made on the finding as to the incorrectness of the assessment of the firm after the provision was introduced in the statute book, *viz.*, 1st April, 1952. There would have been nothing unjust or inequitable in the legislature directing that rectification of the assessment of the partner should always follow the assessment or re-assessment of the firm made finally. On the other hand, we think rectification of the partner's assessment should logically follow the re-assessment or modification of the firm's assessment. Otherwise, there would be an unaccounted for divergence between a person's assessment as an individual and his assessment as a partner of a firm. But the legislature, in our opinion, did not intend to disturb completed assessment of partners except within the period of time indicated earlier in this judgment and unless the finding as to the incorrectness of the firm's assessment was made after the *terminus a quo* above mentioned.

In the result, the appeals are allowed. The judgment and order of the High Court of Madras are set aside and the orders of rectification passed by the Income-tax Officer are held to be effective and binding on the respondents. In the circumstances there will be no orders to the costs of these appeals.

Hegde, J. (dissenting).—The respondents in these appeals were the partners of a registered firm carrying on business in gunnies. For the assessment year 1943-44, *i.e.*, the assessment year ending 31st March, 1944, the firm in question was assessed to tax on 22nd January, 1946. Two days thereafter, namely on 24th January, 1946, the partners of the said firm were also assessed to tax for the assessment year 1943-44 after taking into consideration their share of profits in the firm. The Indian Income-tax Act, 1922, to be hereinafter referred to as the Act, was amended by Act XXV

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1. (1962) 46 I.T.R. 609.
2. (1963) 2 S.C.R. (Supp.) 92 : (1963) 1 S.C.J. 491 : (1963) 48 I.T.R. (S.C.) 154 : A.I.R. 1963 S.C. 1436.
3. (1963) 1 M.L.J. (S.C.) 107 : (1963) 1 An. W.R. (S.C.) 107 : (1963) 1 S.C.J. 535 : (1962) 44 I.T.R. 809 : (1962) 2 S.C.R. (Supp.) 716 : A.I.R. 1962 S.C. 918.

of 1953. The said amending Act among other provisions incorporated section 35 (5) into the Act. Section 1 (2) of that Act provided that "subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952." On 11th September, 1952, the Income-tax Officer issued notice to the firm under section 34 of the Act requiring the firm to show cause why its assessment for the assessment year 1943-44 should not be re-opened and enhanced for the reasons mentioned in that notice. In the proceedings that followed the assessment of the firm was substantially enhanced on 30th May, 1959. Thereafter, the proceeding against the respondents were initiated under section 35 (5) read with section 35 (1) as per the notices dated 24th July, 1959. In those proceedings the assessment of the respondents for the assessment year 1943-44 was enhanced. The respondents challenged the validity of those proceedings in the High Court of Judicature at Madras in Writ Petitions 1229-1233 of 1961 on its file. The High Court following, the decisions of this Court in *Income-tax Officer, Madras* v. *S. K. Habibullah*[1], and *Second Additional Income-tax Officer, Guntur* v. *Atmala Nagaraj and others*[2], allowed those writ petitions and quashed the impugned orders, These appeals are directed against the said decision.

As the matters now stand, the question of law arising for decision is not *res integra*. It is concluded by the decision of this Court in *Atmala Nagaraj's case*[2] wherein this Court laid down that sub-section (5) of section 35 was not applicable to cases where the assessment of a partner of a firm was completed, before 1st April, 1952, even though the assessment of the firm was completed, after 1st April, 1952.

Evidently, encouraged by some of the observations in the decision of this Court in *Ahmedabad Mfg. & Calico Printing Co., Ltd.* v. *S. C. Mehta, Income-tax Officer and another*[3] Mr. S. K. Aiyer, learned Counsel for the department contended that *Habibullah's case*[1], and *Atmala Nagaraj's case*[2], were not correctly decided and that they should be overruled. Though the majority have not acceded to the contention of Mr. S. K. Aiyer that *Habibullah's case*[1], has not been correctly decided, it has accepted his contention that *Atmala Nagaraj's case*[2], was not correctly decided. As I am unable to concur with that conclusion, I am constrained to deliver this dissenting judgment. In my opinion, no case is made out to overrule the decision of this Court either in *Habibullah's case*[1] or in *Atmala Nagaraj's case*[2].

As seen earlier, the assessments in question were made as far back as 24th January, 1946. Every assessment under the Act is final unless the same is modified in appeal or revision or re-opened under section 34 or rectified under section 35. The assessment with which we are concerned in this case was neither modified in appeal or revision nor reopened under section 34. The question for decision is whether it can be rectified under section 35.

Under the Act, the assessment of a firm and the assessment of its partners are two different assessments though in assessing a partner his share in the firm's profits is added to his other income. In fact, the profits of a registered firm are subject to double tax, firstly, in the hands of the firm and nextly in the hands of its partners. As the law stood prior to the amending Act 25 of 1953, the assessment of a partner could not be rectified under section 35 (1) on the ground that the firm's assessment had been enhanced as a result of re-assessment. In other words, the re-assessment of a firm could not be considered as a mistake apparent from the records of the assessment of its partners. That was the view taken by the Andhra Pradesh High Court in *Kanumarlapudi Lakshminarayana Chetty* v. *First Additional Income-tax Officer, Nellore*[4], and that view was accepted as correct by this Court in *Habibullah's case*[1]. Therefore, all that we have to see is whether section 35 (5) one of the group of clauses added by Act 25 of 1953 could have been availed of by the Income-tax Officer in making the impugned rectifications.

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1. (1963) 1 M.L.J. (S.C.) 107: (1963) 1 An. W.R. (S.C.) 107 : (1963) 1 S.C.J. 535 : (1962) 2 S.C.R. (Supp.) 716 : (1962) 44 I.T.R. 809 : A.I.R. 1962 S.C. 918.
2. (1962) 46 I.T.R. 609.
3. (1963) 1 S.C.J. 491 : (1963) 48 I.T.R. (S.C.) 154: (1963) 2 S.C.R. (Supp.) 92: A.I.R. 1963 S.C. 1436.
4. (1956) An. W.R. 243 : (1956) An. L.T. 798 : I.L.R. (1956) A. P. 301 : (1956) 29 I.T.R. 419 : A.I.R. 1957 A.P. 159.

Section 35 (5), to the extent it is material for our present purpose, reads as follows :

" Where in respect of any completed assessment of a partner in a firm, it is found on the assessment or re-assessment of a firm......that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner, or, if included, is not correct, the inclusion of the share of the assessment or the correction thereof as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm."

Section 35 (1) empowers the Income-tax authorities to rectify mistakes apparent from the record of certain orders passed by them. The clause (omitting parts not material) provides that the Income-tax Officer may, any time within the four years from the date of any assessment order passed by him, on his own motion, rectify any mistake apparent from the record of the assessment. As seen earlier, prior to the amending Act XXV of 1953, the Income-tax Officer could not have made the rectifications with which we are concerned in these appeals. Therefore, the question for decision is whether by the exercise of the powers conferred on him by section 35(5), the Income-tax Officer could have validly made the impugned rectifications ?

It may be noted that in these cases both the assessment of the firm as well as the assessment of its partners were made long before 1st April, 1952. But the assessment of the firm was reopened and the firm reassessed after that date. In *Habibullah's case*[1], this Court laid down that the legislature had given to clause 5 of section 35 which was incorporated with effect from 1st April, 1952, a partial retrospective operation. The provision enacted by clause 5 is not procedural in character. It affects the vested rights of the assessee. Therefore in the absence of compelling reasons, the Court would not be justified in giving a greater retrospectivity to that provision than is warranted by the plain words used by the legislature. Clause 5 of section 35 does not purport to amend clause 1 of the same section. It confers additional powers upon the Income-tax authorities and that power cannot be exercised in respect of assessment of a firm which had been completed before the date on which the power had been invested. This Court quoted with approval the observations of the Privy Council in *Income-tax Commissioner* v. *Khemchand Ramdas*[2]:

" When once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in sections 34 and 35 of the Act..........and within the time limited by those sections."

From this decision the correctness of which is not doubted by the majority, it follows that section 35 (5) is only retrospective as from 1st April, 1952 ; it has no greater retrospectivity and that section cannot affect vested rights. No doubt that decision was dealing with the assessment of a firm, but the ratio of that decision, in my opinion, applies with equal force to the assessment of a partner. If the assessment of a firm made before 1st April, 1952, cannot be reopened under section 35 (1) read with section 35 (5), the same must be equally true of the assessment of a partner of a firm. The ratio of the decision in *Habibullah's case*[1], is that rights which have become final prior to 1st April, 1952, cannot be affected by having recourse to section 35 (5).

By applying the ratio of the decision in *Habibullah's case*[1], this Court held in *Atmala Nagaraj's case*[3], that sub-section (5) of section 35 was not applicable to cases where the assessment of a partner was completed before 1st April, 1952 even though the assessment of the firm of which he was the partner was completed after 1st April, 1952. At page 612 of the report, this is what this Court observed in *Atmala Nagaraj's case*[3] :

"Here, the original assessment was made before the amendment, and to that assessment the amended provision cannot still be made applicable for the reason to be given by us, even though the assessments of the firms were after 1st April, 1952, and sub-section (5) has not been made applicable

1. (1962) 44 I.T.R. 809 : (1963) 1 M.L.J. (S.C.) 107 : (1963) 1 An.W.R. (S.C.) 107 : (1963) 1 S.C.J. 535 : (1962) 2 S.C.R. (Supp.) 716 : A.I.R. 1962 S.C. 918.

2. (1938) 2 M.L.J. 115 : L.R. (1938) 65 I.A. 236 at 248: 6 I.T.R. 414 : A.I.R. 1938 P.C. 175.

3. (1962) 46 I.T.R. 609.

to such assessment, either expressly or by implication. It has been given a limited retrospectivity from 1st April, 1952, and it was held by this Court in the cited case that it was not open to Courts to give more retrospectivity to it. Resort in this case could only be taken to the law as it stood before the introduction of sub-section (5) ' and as determined already by this Court, the record of the firm's assessment could not then be called in aid to demonstrate an error on the record of a partner's assessment. It was further held in *S.K. Habibullah's case*[1] that the provision enacted by sub-section (5) is not procedural in character and that it affects vested rights of an assessee. In our opinion, sub-section (5) could not be used in this case, and the decision of the High Court was right"

It may be noted that both the decisions in *Habibullah's case*[1], and *Atmala Nagaraj's case*[2], were rendered by the same Bench (consisting of S. K. Das, Hidayatullah and Shah, JJ.). I am unable to accept the contention that *Atmala Nagaraj's case*[2], laid down any new legal principle. It merely applied the principle laid down in *Habibullah's case*[1], to the facts of that case. In my opinion there is no legal basis to distinguish the one from the other.

In *Ahmedabad Manufacturing and Calico Ptg. Co. case*[3], this Court was called upon to interpret the scope of sub-section (10) of section 35 of the Act which was brought into force on 1st April, 1956. The language of that provision is wholly different from that of section 35 (5). It is not clear from the report why in that case it became necessary to consider the correctness of the decisions of this Court in *Habibullah's case*[1] and *Atmala Nagaraj's case*[2]. But it appears that in the course of the arguments the correctness of those decisions was put into issue. Three separate judgments were delivered in that case, one on behalf of S. K. Das and Kapur, JJ., by Das, J., another on behalf of Hidayatullah and Raghubar Dayal, JJ., by Hidayatullah, J., and the third by Sarkar, J. Sarkar, J., in his judgment merely referred to *Habibullah's case*[1] and not to *Atmala Nagaraj's case*[2]. Dealing with *Habibullah's case*[1], this is what his Lordship observed :

" As to *S. K. Habibullah's case*[1] I do not think that much assistance can be had from it. It applied the rule of presumption against a statute having a retrospective operation—as to which rule, of course, there is no dispute—to sub-section (5) of section 35. Now cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the language with which it is concerned and statutes are not often expressed in the same language. The language used in sub-sections (5) and (10) seems to me to be wholly different. There is nothing in *S. K. Habibullah's case*[1] to indicate that in the opinion of the learned Judges deciding it there were any words which would indicate that sub-section (5) was to have a retrospective operation. In my view, sub-section (10) contains such words. Furthermore, I do not find that the other considerations to which I have referred arose for discussion in that case. In my view, the two cases are entirely different."

Das, J., accepted the correctness of the decision in *Habibullah's case*[1], but while dealing with *Atmala Nagaraj's case*[2], he observed :

" We may point out, however, that in *Second Additional Income-tax Officer* v. *Atmala Nagaraj*[2] this Court went a step further and held that sub-section (5) of section 35 was not applicable to cases where the assessment of the partner was completed before 1st April, 1952, even though the assessment of the firm was completed after 1st April, 1952. Learned counsel for the appellant frankly conceded before us that he did not wish to go as far as that and contend that even in a case where a declaration of dividend was made after 1st April, 1956, sub-section (10) would not apply ; because that would make sub-section (10) unworkable. The decision in *Second Additional Income-tax Officer* v. *Atmala Nagaraj*[2] may perhaps require reconsideration as to which we need not express any final opinion now, but so far as this case is concerned we see no reason why the principle in *S. K. Habibullah's case*[1] will not apply."

But Hidayatullah, J., who as mentioned earlier was a party to both the decisions, dealing with those decisions observed :

" We do not naturally express a final opinion on sub-section (5). We must leave that to a future case. We must, however, say that the two earlier cases may have to be reconsidered on some future occasion."

For the reasons to be presently stated I would rather prefer to follow the decisions in *Habibullah's case*[1], and *Atmala Nagaraj's case*[2], which I am sure must have been rendered after deep consideration rather than the passing doubts hesitatingly expressed by two of the learned judges who were parties to those decisions. As seen

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1. (1962) 44 I.T.R. 809 : (1963) 1 S.C.J. 535 : (1963) 1 M.L.J. (S.C.) 107 : (1963) 1 An. W.R. (S.C.) 107 : (1962) 2 S.C.R. (Supp.) 716 : A.I.R. 1962 S.C. 918.
2. (1962) 46 I.T.R. 609.
3. (1963) 1 S.C.J. 491 : (1963) 48 I.T.R. 154 : A.I.R. 1963 S.C. 1436.

earlier, even the majority has not shared the doubt expressed by Hidayatullah, J., as regards correctness of the decision in *Habibullah's case*[1].

The rule laid down in *Habibullah's*[1] and *Atmala Nagaraja's case*[2], is a well settled rule. Dealing with the interpretation of taxing statutes, it is observed in Halsbury's Laws of England (Vol. 36, pp. 416-17) :

"The language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment, and regard must be had to the clear meaning of the words. If the Crown claims a duty under a statute, it must show that that duty is imposed by clear and unambiguous words, and where the meaning of the statute is in doubt, it must be construed in favour of the subject, however much within the spirit of the law the case might otherwise appear to be; but a fair and reasonable construction must be given to the language used without leaning to one side or the other.

The rule that the literal construction of a statute must be adhered to, unless the context renders it plain that such a construction cannot be put on the words, is especially important in cases of statutes which impose taxation. There is no rule admitting equitable construction of a taxing statute ; that is to say cases which are not within the actual words of the statute cannot be brought within the statute by consideration of its governing principle or intention."

Rowlatt, J., observed in *Cape Brand Syndicate* v. *Inland Revenue Commissioners*[3] :

" In a taxing Act one as to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in nothing is to be implied. One can only look fairly at the language used."

These principles have been accepted as correct both by the English Courts and the superior Courts in this country. It is now well settled that if the interpretation of a fiscal enactments is in doubt, the construction most beneficial to the subject should be adopted even if it results in obtaining an advantage to the subject ; the subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot avail the department.

In *Commissioner of Income-tax, Bombay* v. *Provident Investment Co., Ltd,*[4] this Court quoted with approval the following passage from an earlier decision of this Court in *A. V. Farnandez* v. *State of Kerala*[5].

" If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities."

In *Commissioner of Income-tax, Bombay* v. *Elphinstone Spinning and Weaving Mills Co. Ltd.*[6], this Court held that if the words of the taxir g statute fail, then so must the tax. The Courts cannot except rarely and in clear cases, help the draftsmen by a favourable construction.

In *Commissioner of Income-tax, Bombay* v. *Jalgaon Electric Supply Co., Ltd.*[7] this Court again observed :

" The income-tax law seeks to bring within the net of taxation certain class of income, and can only successfully do so if it frames a provision appropriate to that end. If the law fails and the taxpayer cannot be brought within its letter, no question of unjustness as such arises."

In *Banarsi Debi and another* v. *Income-tax Officer, Calcutta, and others*[8], it was observed :

"Before construing the section it will be useful to notice the relevant rules of construction of a fiscal statute. In *Oriental Bank Corporation* v. *Wright*[9] the Judicial Committee held that if a

1. (1962) 44 I.T.R. 809: (1963) 1 S.C.J. 535: (1963) 1 M.L.J. (S.C.) 107 : (1963) 1 An.W.R. (S.C.) 107 : (1962) 2 S.C.R. (Supp.) 716 : A.I.R. 1962 S.C. 918.
2. (1962) 46 I.T.R. 609.
3. (1921) 1 K.B. 64.
4. (1957) S.C.J. 679 : (1957) S.C.R. 1141 : (1957) 32 I.T.R. 190 : A.I.R. 1957 S.C. 664.
5. (1957) 8 S.T.C. 561 : (1957) S.C.J. 689 : (1957) S.C.R. 837: (1957) 2 An. W.R. (S.C.) 129: (1957) 2 M.L.J. (S.C.) 129 : (1957) K.L.T. (S.C.) 705 : A.I.R. 1957 S.C. 657.
6. (1960) 40 I.T.R. 142 : A.I.R. 1960 S.C. 1016.
7. (1960) 40 I.T.R. 184 : A.I.R. 1960 S.C. 1182.
8. (1964) 2 I.T.J. 118 : (1964) 2 S.C.J. 258 : (1964) 7 S.C.R. 539 : (1964) 53 I.T.R. 100, 104 : A.I.R. 1964 S.C. 1742.
9. 5 A.C. 842.

statute professed to impose a charge, the intention to impose a charge on the subject must be shown by clear and unambiguous language. In *Canadian Eagle Oil Co.* v. *R.*[1] Viscount Simon, L.C., observed : ' In the words of Rowlatt, J.......in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'

In other words, a taxing statute must be couched in express and unambiguous language. The same rule of construction has been accepted by this Court in *Gursahai Saigal* v. *Commissioner of Income-tax*[2], wherein it was stated:..........'it is well recognised that the rule of construction that if a case is not covered within the four corners of the provisions of a taxing statute no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter, applies only to a taxing provision and has no application to all provisions in a taxing statute."

In *Commissioner of Income-tax, Madras* v. *Ajax Products Ltd.*[3], this Court quoted with approval the rule laid down by Rowlatt, J., in *Cape Brandy Syndicate case*[4] to which reference has already been made. It went further and observed :

"To put in other words, the subject is not to be taxed unless the charging provision clearly imposes the obligation. Equally important is the rule of construction that if the words of a statute are precise and unambiguous, they must be accepted as declaring the express intention of the legislature,"

From the foregoing decisions it is clear that the consideration whether a levy is just or unjust, whether it is equitable or not, a consideration which appears to have greatly weighed with the majority, is wholly irrelevant in considering the validity of a levy. The Courts have repeatedly observed that there is no equity in a tax. The observations of Lord Hatherley, L. C., in *Pardo* v. *Bingham* [5]:

" In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated",

were made while construing a non-taxing statute. The said rule has, only a limited application in the interpretation of a taxing statute. Further, as observed by that learned judge in that very case the question in each case is " whether the legislature had sufficiently expressed its intention " on the point in issue.

I do not think that the impugned assessments can be said to be just or equitable even if that consideration is at all relevant . The assessments of partners of firms, whose assessments had become final before 1st April, 1952 cannot be reopened. There is no just or equitable ground to differentiate the case of the respondents from those assessees. As seen earlier, the assessment of the respondents had become final as far back as 1946. They would have arranged their affairs on that basis. Thirteen years thereafter, they were called upon to pay additional tax. It cannot be said that that is just or equitable.

This takes me to the question whether the impugned assessments come clearly within the scope of section 35 (5). That is the only relevant consideration. But before going into that question we must remind ourselves that the assessments of the respondents had become final in the year 1946, and under the law as it stood prior to the enactment of section 35 (5), those assessments could not have been interfered with. Section 35 (5) unlike several other provisions in the amending Act of 1953, had been given only a partial retrospective effect. It is made to be operative as from 1st April, 1952. In this background let us now proceed to examine section 35 (5).

Before a case can be held to fall within the scope of section 35 (5), two requirements must be satisfied, namely, (1) that the assessment or reassessment of the firm must have taken place on or after 1st April, 1952, and (2) the assessment of the partner must be a "completed assessment". The next question to be decided is whether the " completed assessment " referred to in section 35 (5) includes an assessment which had become final prior to 1st April, 1952.

1. (1946) A.C. 119.
2. (1963) 1 S.C.J. 149: (1963) 3 S.C.R. 893 : (1963) 48 I.T.R. 1: A.I.R. 1963 S.C. 1062.
3. (1965) 1 S.C.J. 659 : (1965) 1 I.T.J. 623: (1965) 1 S.C.R. 700: (1965) 55 I.T.R. 741 : A.I.R. 1965 S.C. 1358.
4. (1921) 1 K.B. 64.
5. 4 Ch. App. 735.

I am unable to find out how the firm's assessment could have been validly reopened under section 34, in September, 1952. By the time the notice under section 34 was issued, the eight years' period of limitation prescribed in section 34 had expired. But the validity of the firm's reassessment does not appear to have been challenged at any time before the hearing of these appeals. Hence it is not safe to pursue that question.

The concept of a "completed assessment" was introduced for the first time by the amending Act XXV of 1952. The Act as it stood till then only spoke of assessments, re-assessments and rectification of assessments. What did the legislature mean by saying " completed assessment " in section 35 (5) ? That expression is not defined in the Act. The legislature must be considered to have deliberately used that expression in place of the expression " assessment" in expression familiar to Courts and the connotation of which is well settled. On the basis of well recognised canons of construction of statutes we must give that expression a meaning different from that given to "assessment." Evidently, the legislature used the expression "completed assessments " to distinguish that class of assessments, from assessments which are final under the Act. It appears to me, by using that expression, the legislature intended that the assessment of a partner should not be considered as a final assessment till the assessment of the firm becomes final. In other words, the partner's assessment would continue to be tentative till the company's asesment becomes final. If that be the true interpretation of the expression " completed assessment " as I think it is, then that expression can only apply to assessment of partners made on or after 1st April, 1952. The respondent's assessment as mentioned earlier had become final prior to that date. Hence the respondent's assessments cannot be considered as "completed assessments" within the meaning of that word in section 35 (5). Consequently those assessments must be held to be outside the scope of that section.

Section 35 (5) neither expressly nor by necessary implication empowers the Income-tax Officer to reopen assessments which had become final. If the legislature wanted to confer such a power it should have said so as it did in section 35 (6) and in several other provisions in the amending Act, sections 3 (2), 7 (2) and 30 (2) of that Act. Further, if section 35 (5) empowers the reopening of all final assessments of partners of firms, where was the need to give that provision a partial retrospectivity. That very circumstance negatives the contention of the department. Even if it is to be held that the expression " completed assessment " is an ambiguous expression, in that event also, the power conferred under section 35 (5) could not have been exercised to rectify the assessments in question.

From the foregoing it follows that the decision of this Court in *Atmala Nagaraj's case*[1], is correct. Even assuming that section 35 (5) can receive a different interpretation and that interpretation is more reasonable than that adopted by this Court in *Atmala Nagaraj's case*[1] in that event also this Court would not be justified in overruling its previous decision, which has the force of law in view of Article 141 of the Constitution. I am of the opinion that the decisions of this Court should not be overruled excepting under compelling circumstances. It is only when this Court is fully convinced that public interest of a substantial character would be jeopardized by a previous decision of this Court, this Court should overrule that decision. Every time this Court overrules its previous decision, the confidence of the public in the soundness of the decision of this Court is bound to be shaken.

Reconsideration of the decisions of this Court should be confined to questions of great public importance. In law finality is of utmost importance. Legal problems should not be treated as mere subjects for mental exercise. This Court must overrule its previous decisions only when it comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was *res integra* In *Bengal Immunity Co., Ltd.* v. *The State of Bihar and others*[2], this Court laid down that

1. (1962) 46 I.T.R. 609. 2. (1965) 2 S.C.R. 603.

there is nothing in the Constitution which prevents the Supreme Court from departing from a previous decision of its own if the Court is satisfied of its error and its baneful effect on the general interest of the public. Das, Acting C. J., speaking for the majority, observed in the course of his judgment (at page 630 of the report) :

> "It is needless for us to say that we should not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well-being in the light of the surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rigidly fixed limits as suggested before us."

The question of law with which we are concerned in this case was of minor importance, at all times. It has become all the more so because of the passage of time, as it has relevance only to assessments of partners of firms made before 1st April, 1952, and that too in cases where the question of enhancing those assessments arises as a result of the assessment or reassessment of the concerned firms on or after 1st April, 1952. Such cases are not likely to be many.

For the reasons mentioned above, I dismiss these appeals with costs.

ORDER.—In accordance with the opinion of the majority the appeals are allowed, the judgment and order of the High Court of Madras are set aside and the orders of rectification passed by the Income-tax Officer are held to be effective and binding on the respondents. In the circumstances there will be no order as to costs of these appeals.

T.K.K. *Appeals allowed.*

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THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.

The State of Madras etc. .. *Appellants**

v.

M/s. A. Habibur Rehman & Sons etc. .. *Respondents.*

Sales Tax Validation Act, (VII of 1956) and Constitution of India (1950), Article 286, clause 1 (a), 1 (b), (2) and (3)—Clauses 1 (a), 1 (b), (2) and (3) intended to deal with different topics—One not to be projected or read into another—Removal of ban under Article 286 (2) on State's power to legislate by the Validation Act—Validation Act, if removed the ban under Article 286 (1)—Assessee delivering the goods outside the State for consumption therein—Such Explanation sale under section 2 (h) of the Madras General Sales Tax Act, 1959, if liable for taxation by Madras State taxing authorities

Madras General Sales Tax Act (I of 1959), section 38 (4) and (5)—High Court receiving affidavits in evidence and not acting under section 38 (4)—Appellant raising no objection in the High Court—If open to the appellant to raise the question.

The operative provisions of the several parts of Article 286, namely, clause (1) (a), clause (1) (b), clause (2) and clause (3), are intended to deal with different topics and one cannot be projected or read into another. In other words, the legislative authority of the States to impose taxes on sales and purchases was restricted by four limitations in respect of sales or purchases outside the State, in respect of sales or purchases which take place in the course of inter-State trade or commerce, in respect of sales or purchases in the course of imports into or exports out of India and in respect of sales and purchases of goods declared by Parliament to be essential for the life of the community. These limitations over lap to some extent, but the legislative power of the State to tax sale or purchase transactions may be exercised only if it is not hit by any of the limitation. The restrictions imposed by Article 286 are cumulative.

* C. As. Nos. 495, 539 and 540, 684, 694, 717 and 857 of 1966. 30th August, 1967.

The Sales Tax Validation Act (VII of 1956) merely lifted the ban under Article 286 (2) of the Constitution on the State's power to legislate but the ban imposed by Article 286 (1) (*a*) of the Constitution was still effective and could not be removed by legislation of Parliament. In other words, even if the ban under Article 286 (2) is removed by the Validation Act, no State can tax an inter-State sale of purchase which takes place outside its territorial limits. What is an ' outside sale ' is defined by the Constitution as Explanation to Article 286 (1) which states what should be deemed an " inside sale." By Article 286 (1) (as it stood before the Sixth Amendment) sales as a direct result of which goods were delivered in a State for consumption in such State, *i.e.*, the sales falling within the Explanation to Article 286 (1) were fictionally to be regarded as inside that State in which such delivery took place and being outside all other States exempt from sales-tax by these other States. The Validation Act has lifted the ban under Article 286 (2) alone but did not remove the ban under Article 286 (1) which continued to apply without being affected by the Validation Act. Therefore, even if a sale fell within the Explanation under section 2 (*h*) of the Madras General Sales Tax Act, 1939, it was beyond the competence of the Madras State to tax if the assessee had delivered the goods outside the State for consumption therein.

Though it is true that the High Court should have remitted the matter to the Appellate Tribunal if it considered it necessary for the proper disposal of the case to take in evidence any additional facts under section 38 (5) of the Madras General Sales Tax Act, 1959 (Madras Act I of 1959) before passing an order under sub-section (4) remitting the matter to the Appellate Tribunal on the specific question or issue, having preferred no objection before the High Court, it is not open to the appellant to say that the High Court acted illegally in taking the affidavits in evidence.

Appeals by Special Leave from the Judgments and Orders, dated the 23rd September, 1963, 29th April, 1963, 29th July, 1964, 13th March, 1964, 22nd June, 1964 and 24th June, 1964 of the Madras High Court in Tax Case Nos. 246 of 1962 (Revision No. 96), 202 and 203 of 1961, 67 of 1963 (Appeal No. 6), 43 of 1964 (Revision No. 17), 12 of 1963 (Appeal No. 2) and 112 of 1964 (Revision No. 64) respectively.

G. Ramanujam, Government Pleader and *A.V. Rangam*, Advocate, for Appellants (In all the Appeals).

T. A. Ramachandran, Advocate for *M/s. J. B. Dadachanji & Co.*), for Respondent (In C. A. No. 495 of 1966).

M. S. K. Sastri and *M.S. Narasimhan*, Advocates, for Respondent (In C.As. Nos. 539 and 540 of 1966).

A.N. Sinha and *D.N. Gupta*, Advocates, for Respondent (In C.A. No. 684 of 1966).

S. Kartar Singh Suri and *E. C. Agrawala*, Advocates, for Respondent (In C. A. No. 694 of 1966).

Avad Behari, Advocate, for Respondent. (In C. A. No. 717 of 1966).

G. N. Dikshit, Advocate, for Respondent (In C. A. No. 857 of 1966).

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by Special Leave, from the judgment of the Madras High Court dated 23rd September, 1963, in Tax Case No. 246 of 1962.

The respondent who was a Beedi manufacturer in Gudiyattam, Madras State, was assessed to sales tax on a taxable turnover of Rs. 1,73,502-11-10 for the assessment year 1955-56 by the Deputy Commercial Tax Officer. Against this order of assessment dated 15th February, 1957 the respondent appealed to the Appellate Assistant Commissioner of Commercial Taxes, Salem, disputing the inclusion of a sum of Rs. 1,11,299 and odd on the ground that the said amount represented either second purchases or purchase made outside the State of Madras. Pending the appeal the Madras General Sales Tax Act, 1959 was passed and the earlier Act of

1939 was repealed and by force of the provisions in the 1959 Act the appeal was finally disposed of by the Appellate Assistant Commissioner of Commercial Taxes, Salem. By his order dated 2nd July, 1960, the Appellate Assistant Commissioner held that the excise duty paid by the respondent could not form part of his purchase turnover but in purported exercise of his powers under the new Act enhanced the assessment of the turnover by including a sum of Rs. 1,15,406-14-9 as inter-State purchases from 1st April, 1955 to 5th September, 1955. The respondent took the matter in further appeal to the Sales Tax Appellate Tribunal. The appellant also filed petitions before the Tribunal for enhancement of the assessment by Rs. 3,66,213-12-0 on the ground that the amount represented sales of manufactured beedies to non-resident buyers during the period 12th May, 1955 to 5th September, 1955 and that the goods in question were within the territory of the State at the time the contract of sale in respect thereof was made. It was contended on behalf of the appellant that the sales were taxable by virtue of Explanation (2) to section 2 (*h*) of the Madras General Sales Tax Act, 1939 in view of the lifting of the ban on the levy of tax on inter-State sales by the Sales Tax Validation Act, 1956 (Central Act VII of 1956), hereinafter called the ' Validation Act ' and that it was wrongly excluded from the taxable turnover by the taxing authorities. By its order dated 13th July, 1962, the Appellate Tribunal allowed the petition for enhancement and rejected the contention of the respondent that the sales were agency sales through Commission Agents. As regards the alleged second purchases or outside purchase of raw tobacco, the Appellate Tribunal remanded the case to the Appellate Assistant Commissioner. Against the order of the Appellate Tribunal the respondent filed a petition in the High Court of Madras under section 38 of the Madras General Sales Tax Act, 1959. By its order dated 23rd September, 1963 the High Court held: (1) that the inclusion of the inter-State purchases from 1st April, 1955 to 5th September, 1955 of Rs. 1,15,406-14-9 was bad as the Appellate Assistant Commissioner had no jurisdiction to include that turnover ; (2) that the turnover of Rs. 3,66,213-12-0 included by the Appellate Tribunal could not be brought to tax as the beedies, which were the subject of the relevant sales were delivered outside the State for purpose of consumption and as the sales therefore constituted Explanation sales under Article 286 (1) of the Constitution as it stood prior to the Sixth Amendment and consequently the Madras State had no jurisdiction to tax the said sales. Being aggrieved by the part of the decision of the Madras High Court on the question of taxability of the said transactions of inter-State sales effected prior to 6th September, 1955, the State of Madras has brought the present appeal.

The question presented for consideration in this appeal is whether the Madras State had jurisdiction to levy sales tax on the alleged " Explanation sales " by the respondent during the period between 1st April, 1955 to 5th September, 1955 by virtue of Explanation (2) to section 2 (*h*) of the Madras General Sales Tax Act, 1939.

Section 2 (*h*) of the Madras General Sales Tax Act, 1939, states :

" 2. In this Act, unless there is anything repugnant in the subject or context—

(*h*) ' sale ' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to other in the course of trade or business for cash for or deferred payment or other valuable consideration, and includes also a transfer of property in goods involved in the execution of a works contract, and in the supply or distribution of goods by a co-operative society, club, firm or any association to its members for cash or for deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge ;

. . . .

Explanation (2).—The sale or purchase of any goods, shall be deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made—

. . . ."

(*a*) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or

(*b*) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this State at any time after the contract of sale or purchase in respect thereof was made.

Section 3 which is the charging section provides as follows :—

"Subject to the provisions of this Act,—

(*a*) every dealer shall pay for each year a tax on his total turnover for such year ; and

(*b*) the tax shall be calculated at the rate of three pies for every rupee in such turnover :

Provided that if and to the extent to which such turnover relates to articles of food or drink or both sold in a hotel, boarding house, restaurant, stall or any other place, the tax shall be calculated at the rate of four and a half pies for every rupee, if the turnover relating to those articles is not less than twenty-five thousand rupees."

Under the Government of India Act, 1935, it was open to every Provincial Legislature to enact legislation authorising the levy of tax on sale of goods in respect of transactions whether within or outside the Province, provided the Province had a territorial nexus with one or more elements constituting the sale. This resulted in levy of sales tax by many Provinces in respect of the same transaction—each Province fixing upon one or more elements constituting the sale with which it had a territorial nexus. The Constitution with a view to prevent imposition of manifold taxes on the same transaction of sale, imposed by Article 286 restrictions on the levy of sale and purchase taxes on certain classes of transactions. Article 286, as it was orginally enacted, read as follows :

" (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

Article 286 thus imposed four bans upon legislative power of the States. Clause (1) prohibited every state from imposing or authorising the imposition of, a tax on

outside sales and on sales in the course of import into or export outside the territory of India. By clause (2) the State was prohibited from imposing tax on the sale of goods where such sale took place in the course of inter-State trade or commerce. But the ban could be removed by the legislation made by the Parliament. By clause (3) the Legislature of a State was incompetent to impose or authorise imposition of a tax on the sale or purchase of any goods declared by the Parliament by law to be essential for the life of the community, unless the legislation was reserved for the consideration of the President and had received his assent.

In *The Bengal Immunity Co., Ltd.* v. *The State of Bihar and others*[1], it was held by this Court that the operative provisions of the several parts of Article 286, namely, clause (1) (*a*), clause (1) (*b*), clause (2) and clause (3), are intended to deal with different topics and one cannot be projected or read into another, and therefore the Explanation in clause (1) (*a*) cannot legitimately be extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2). It was further held that until the Parliament by law made in exercise of the powers vested in it by clause (2) of Art. 286 provides otherwise, no State may imposeor authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commence, and therefore the State Legislature could not charge inter-State sales or purchases until the Parliament had otherwise provided. The judgment of this Court in *The Bengal Immunity Company's case*[1] was delivered on 6th September, 1955. The President then issued the Sales Tax Laws Validation Ordinance, 1956, on 30th January, 1956, the provisions of which were later embodied in the Sales Tax Laws Validation Act, 1956. Section 2 of this Act provided :

> " Validation of State laws imposing, or authorising the imposition of, taxes on sale or purchase of goods in the course of inter-State trade or commerce,—Notwithstanding any judgment, decree or order of any Court, no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951, and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce ; and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law................"

By this Act therefore the Parliament removed the ban contained in Article 286 (2) of the Constitution retrospectively but limited only to the period between 1st April, 1951 and 6th September, 1955. All transactions of sale, even though they were inter-State sales could for that period be lawfully charged to tax.

On behalf of the appellant the argument was put forward that the Validation Act having lifted the ban on taxation of inter-State sales, the transactions of the respondent for the period from 1st April, 1955 to 5th September, 1955 were assessable to tax under the provisions of the Madras General Sales Tax Act, 1939 operating on its own terms. Counsel for the appellant particularly based his argument on the second Explanation to section 2 (*h*) of that Act and the decision of this Court in *M/s. Ashok Leyland Ltd.* v. *The State of Madras*[2]. In our opinion, the argument put forward on behalf of the appellant is not warranted. The decision of this Court in *Ashok Leyland's case*[2] case has no bearing on the question presented for determination in this case. The reason is that in that case the deliveries of motor vehicles were inside the Madras State and the inter-State sales in question were not " Explanation sales" falling within Article 286 (1) (*a*). It is a well-settled proposition that the operative provisions of the several parts of Article 286, namely, clause(1) (*a*), clause (1) (*b*), clause (2) and clause (3), are intended to deal with different topics and one cannot be projected or read into another, and therefore the Explanation in clause

1. (1965) 2 M.L.J. 168 : (1965) S.C.J. 672 : (1965) 2 S.C.R. 603.
2. (1962) 1 M.L.J. (S.C.) 78 : (1962) 1 S.C.J. 165 : (1962) 1 An.W.R. (S.C.) 78 : (1962) 1 S.C.R. 607.

(1) (*a*) cannot legitimately be extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2). In other words, the legislative authority of the States to impose taxes on sales and purchases was restricted by four limitations—in respect of sales or purchases outside the State, in respect of sales or purchases in the course of imports into or exports out of India, in respect of sales or purchases which take place in the course of inter-State trade or commerce and in respect of sales and purchases of goods declared byParliament to be essential for the life of the community. These limitations overlap to some extent, but the legislative power of the State to tax sale or purchase transactions may be exercised only if it is not hit by any of the limitations. The restrictions imposed by Article 286 are cumulative. If follows therefore that even if the ban under Article 286 (2) is lifted by Parliament by the enactment of the Validation Act, the Madras State cannot still tax inter-State sales or purchases which take place outside its territorial limits because of the bar under Article 286 (1) (*a*) of the Constitution. What is an " outside sale" is defined by the Constitution by the Explanation to Article 286 (1) which states what should be deemed to be an " inside sale." As provided by the Explanation to Article 286 (1), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of the sale notwithstanding the fact that under the general law relating to sale of goods the property in the goods has, by reason of such sale or purchse, passed to another State. The legal position was stated by this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] as follows :

> " It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place notwithstanding the property in such goods passed in another State. Why an ' outside' sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test : Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein ? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase ; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

This observation was not in any way dissented from by the judgment of this Court in the later case—*The Bengal Immunity Company's case*[2]. The result therefore is that if the terms of the Explanation are satisfied such sales are by a fiction deemed to be ' inside' the State of delivery-*cum*-consumption and therefore 'outside' all other States. In such cases therefore only the State ' inside' which the sale is deemed to take place by virtue of the Explanation is exempt from the ban imposed by Article 286 (1) (*a*) ; all other States would be subject to that ban in respect of such sales. This principle underlies the decision of this Court in *Shree Bajrang Jute Mills Ltd.* v. *State of Andhra Pradesh*[3]. In that case, the appellant, carrying on business as a manufacturer of jute goods with its factory at Guntur, used to send jute bags by railway to the cement factories of the A.C.C. outside the State of Andhra. For securing a regular supply of jute bags, the A.C.C. entered into a contract with the appellant and under the despatch instructions from that company, the appellant loaded the goods in the railway wagons, obtained railway receipts in the name of the A.C.C. as consignee and against payment of the price, delivered the receipts to the Krishna Cement Works, Tadepalli, which was for the purpose of receiving the railway receipt and making payment, the agent of the A.C.C. From the amounts shown as gross

1. (1953) S.C.R. 1069, 1082 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743.
2. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672: (1955) 2 S.C.R. 603.
3. (1964) 2 S.C.J. 540 : (1964) 2 M.L.J. (S.C.) 122 : (1964) 2 An.W.R. (S.C.) 122: (1964) 6 S.C.R. 691 : A.I.R. 1966 S.C. 376.

turnover in the return for the assessment year 1954-55, the appellant claimed reduction of certain amounts in respect of the goods, supplied by rail to the A.C.C. outside the State of Andhra Pradesh under its despatch instructions. The Commercial Tax Officer and the Deputy Commissioner of Commercial Taxes disallowed the claim and held that as the railway receipts were delivered to the agent of the buyer within the State of Andhra, and price was also realized from the agent of the buyer within the State, goods must be deemed to have been delivered to the buyer in the State of Andhra Pradesh, and the appellant was liable to pay tax on the sales. The question for determination in this Court was whether the sales by the appellant to the A.C.C. may be regarded as "non-Explanation sales", *i.e.,* falling outside the explanation to Article 286 (1). It was held by this Court that if the goods were delivered pursuant to the contracts of sale outside the State of Andhra for the purpose of consumption in the State into which the goods were delivered, the State of Andhra could have no right to tax those sales by virtue of the restriction imposed by Article 286 (1) (*a*) read with the Explanation. To attract the Explanation, the goods had to be actually delivered as a direct result of the sale, for the purpose of consumption in the State in which they were delivered. The expression "actually delivered" in the context in which it occurs, can only mean physical delivery of the goods, or such action as puts the goods in the possession of the purchaser and it does not contemplate mere symbolical or notional delivery. It was accordingly held that the State of Andhra had no authority to levy tax in respect of these sale transactions in which the goods were sent under railway receipts to places outside the State of Andhra and actually delivered for the purpose of consumption in those States. The same view was reiterated by this Court in *Singareni Collieries Co., Ltd.* v. *State of Andhra Pradesh*[1]. In that case, the appellant-company carried on the business of mining coal from its collieries and supplying it to consumers both within and outside the State. In proceedings for assessment to Sales tax, the company claimed that it was not liable to pay sales tax under the Hyderabad General Sales Tax Act, 1950, on the price of coal supplied to allottees outside the taxing State pursuant to the directions of the Coal Commissioner issued under the Colliery Control Order, 1945. This claim was rejected by the Sales Tax Officer on the ground that the coal in question was sold F.O.R. colliery siding and was actually delivered to the consumers within the State when it was loaded on their account in Railway Wagons at the colliery siding. The appeals against that decision to the appellate authorities as well as to the High Court were dismissed. It was decided by this Court that so far as the period between 1st April, 1954 and 6th September, 1955 was concerned, sales of coal for delivery to consumers outside the State could not be taxed under the Hyderabad Act because they were covered by the *Explanation* to Article 286 (1) (*a*) as it stood before amendment. It was held that the *Explanation* defines the State in which the goods have actually been delivered for consumption, as the State in which for the purpose of clause (1) (*a*) of Article 286 the sale shall be deemed to have taken place, and that State alone in which the sale is deemed to take place has the power to tax the sale, and for this purpose it is immaterial that property in the goods has under the general law relating to sale of goods passed in another State in which the allottee resided or carried on business.

The legal position therefore is that the Validation Act merely lifted the ban under Article 286 (2) of the Constitution on the State's power to legislate but the ban imposed by Article 286 (1) (*a*) of the Constitution was still effective and could not be removed by legislation of Parliament. In other words, even if the ban under Article 286 (2) is removed by the Validation Act, no State can tax an inter-State sale or purchase which takes place outside its territorial limits. What is an "outside sale" is defined by the Constitution as *Explanation* to Article 286 (1) which states what should be deemed to be an "inside sale." It is well-settled that by Article 286 (1) (as it stood before the Sixth Amendment) sales as a direct result of which goods were delivered in a State for consumption in such State *i.e.*, the sales falling within the *Explanation* to Article 286 (1) were fictionally to be regarded as inside that State

1. (1966) 2 S.C.R. 190 : A.I.R. 1966 S.C. 563.

for the purpose of clause (1) (*a*) and so within the taxing power of the State in which such delivery took place and being outside all other States exempt from sales-tax by those other States. As we have already said, the Validation Act has lifted the ban under Article 286 (2) alone but did not remove the ban under Article 286 (1) which continued to apply without being affected by the Validation Act. Therefore, even if a sale fell within the *Explanation* under section 2 (*h*) of the Madras General Sales Tax Act, 1939 it was beyond the competence of the Madras State to tax if the assessee had delivered the goods outside the State for consumption therein. It follows therefore in the present case that the goods sold and delivered outside the State during the period from April, 1955 to September, 1955 were not liable to tax under the Madras General Sales Tax Act, 1939 and the taxing authorities had no jurisdiction to include Rs. 3,66,213-12-0 in the turnover of the respondent.

We proceed to consider the next question raised in this case, *viz.*, that the High Court acted illegally in entertaining and relying upon the affidavits filed by the respondent while exercising its revisional powers under section 38 of the Madras General Sales Tax Act, 1959 (Madras Act I of 1959). It was contended for the appellant that the High Court could not itself record a finding of fact after taking additional evidence and there was no express power conferred by section 38 upon the High Court for taking additional evidence. Section 38 of the Madras General Sales Tax Act, 1959 states :

"38. (1) Within ninety days from the date on which a copy of the order under sub-section (3) of section 36 is served in the manner prescribed, any person who objects to such order or the Deputy Commissioner may prefer a petition to the High Court on the ground that the Appellate Tribunal has either decided erroneously or failed to decide any question of law :

Provided that the High Court may admit a petition preferred after the period of ninety days aforesaid if it is satisfied that the petitioner had sufficient cause for not preferring the petition within the said period.

....

(4) (*a*) If the High Court does not dismiss the petition summarily, it shall, after giving both the parties to the petition a reasonable opportunity of being heard determine the question of law raised and either reverse, affirm or amend the order against which the petition was preferred or remit the matter to the Appellate Tribunal, with the opinion of the High Court on the question of law raised or pass such order in relation to the matter as the High Court thinks fit.

(*b*) Where the High Court remits the matter under clause (*a*) with its opinion on the question of law raised, the Appellate Tribunal shall amend the order passed by it in conformity with such opinion.

(5) Before passing an order under sub-section (4), the High Court may, if it considers it necessary so to do, remit the petition to the Appellate Tribunal, and direct it to return the petition with its finding on any specific question or issue.

....

(8) (*a*) The petitioner or the respondent may apply for review of any order passed by the High Court under clause (*a*) of sub-section (4) on the basis of the discovery of new and important facts which after the exercise of due diligence were not within his knowledge or could not be produced by him when the order was made.

(*b*) The application for review shall be preferred within such time, and in such manner as may be prescribed, and shall where it is preferred by any party other than the Deputy Commissioner be accompanied by a fee of one hundred rupees.

...."

It was argued for the appellant that under section 38 the High Court was empowered to interfere with the order of the Appellate Tribunal only if it had either decided a

question of law erroneously or had failed to decide any question of law. It was said that in any case the High Court should have remitted the matter to the Appellate Tribunal if it considered it necessary for the proper disposal of the case to take in evidence any additional facts under section 38 (5) of the Act before passing an order under sub-section (4) remitting the matter to the Appellate Tribunal on any specific question or issue. In our opinion there is considerable force in the argument put forward on behalf of the appellant. But we do not wish to express any concluded opinion on this point in the present case. It appears that the appellant did not raise any objection before the High Court when the affidavits were taken into evidence. Having preferred no objection before the High Court it is not now open to the appellant to say that the High Court acted illegally in taking those affidavits in evidence. It was submitted for the respondent that the transactions themselves took place in 1955, nearly 12 years back and ordinarily accounts of dealings would not be retained beyond five years. Counsel for the respondent referred in this connection to a rule framed under the Madras General Sales Tax Act. In these circumstances it was hardly worthwhile for the High Court to remand the case for a fresh investigation. We therefore reject the argument of the appellant on this aspect of the case.

For the reasons assigned we hold that this appeal has no merit and must be dismissed. In the circumstances of the case we do not propose to make any order as to costs.

Civil Appeals Nos. 539 *and* 540 *of* 1966, 717 *of* 1966, 684 *of* 1966, 694 *of* 1966 *and* 857 *of* 1966 :

The main question to be considered in these appeals is whether, after the enactment of the Validation Act, Madras State had the constitutional power to tax " Explanation sales" falling under Article 286 (1) (*a*) of the Constitution, *i.e.*, where goods were delivered for consumption outside the State and whether the ban under Article 285 (1) (*a*) was an independent ban and whether it could be removed by Parliamentary legislation under Article 286 (2). This question has been the subject-matter of consideration in Civil Appeal No. 495 of 1966, and for the reasons given in that case, we hold that the Madras State had no authority to levy sales tax on such transactions of sale and the High Court was right in holding that the constitutional bar under Article 286 (1) (*a*) was not lifted by the Validation Act.

In Civil Appeals Nos. 539 and 540 of 1966 Counsel for the appellant took an additional point that the High Court ought not to have called for an affidavit from the respondent " regarding the mode of sale of wool to the Bangalore merchants". It was also said that the High Court had no power to take that affidavit into evidence and come to a finding that the sales were "Explanation sales" within the meaning of Article 286 (1) (*a*) of the Constitution. It, however, appears that the appellant did not object to the production of the affidavit in the High Court. It must be taken that the objection was waived and it is not now open to the appellant to argue that the High Court had no power to take the affidavit into evidence. We accordingly reject the argument of the appellant on this point.

In Civil Appeal No. 717 of 1966 it was argued for the appellant that the High Court erred in assuming that in the transactions in question the goods were delivered for consumption outside the Madras State. It was said that the case should have been remanded by the High Court to the Appellate Tribunal for a fresh finding on the point. The High Court has, however, taken the view that the transactions took place in 1955-56 and ordinarily accounts of dealings would not be retained by the assessee beyond five years. The High Court has observed that apart from this the transactions were very large in number, about 4,000 and odd and most of them were for a comparatively small value. Some of the invoices referred in the assessment order show that they were for small amounts in regard to articles like paint, aluminium tar and other articles. In these circumstances the High Court came to the conclusion that the goods were delivered to places outside the Madras State for the purpose of consumption in the delivery States. The High Court added that it was hardly worthwhile in these circumstances to direct a remand of the case to the Appel-

late Tribunal for a fresh enquiry. It is manifest that the finding of the High Court on this point is a finding on a question of fact and as there is proper material to support the finding of the High Court it is not possible to accept the contention of the appellant that the finding is in any way defective in law. We accordingly reject the argument of the appellant on this point.

For the reasons expressed we hold that these appeals have no merit and they are accordingly dismissed. In the circumstances of the case we do not propose to make any order as to costs except in C.A. No. 717 of 1966. In that appeal, the respondent will be entitled to costs as already ordered on 29th July, 1965.

V.M.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, S.M. SIKRI AND V. RAMASWAMI, JJ.

The State of Madras (In both the Appeals) .. *Appellant**

v.

T. Narayanaswami Naidu and another .. *Respondents.*

Madras General Sales Tax Act (I of 1959), sections 3 and 4 and Central Sales Tax Act (LXXIV of 1956)—Liability of—Meaning of the expression "at the point of last purchase in the State".

It is true that sections 3 and 4 of the Madras Act speak of 'a year' *i.e.*, the financial year, and it is only the turnover during that year that is liable to taxation in the hands of the assessee, but section 4 has to be read with the Second Schedule and reading section 4 with the Second Schedule, it is clear that a dealer is not liable to pay a tax on the purchases until the purchases acquire the quality of being the last purchases inside the State. In other words, when he files a return and declares the stock in hand, the stock in hand cannot be said to have been acquired by last purchase because he may still during the next assessment year sell it or he may consume it himself or the goods may be destroyed etc., He would be entitled to claim before the assessing authorities that the character of acquisition of the stock in hand was undermined; in the light of subsequent events it may or may not become the last purchase inside the State. The assessee is not liable till the purchase of declared goods acquires the character of a last purchase within the Second Schedule.

Appeals by Special Leave from the Judgement and Order dated the 11th August 1964 of the Madras High Court in Tax Cases Nos. 105 and 125 of 1963, (Revision Nos. 64 and 81).

G. Ramanujam, and *A. V. Rangam,* Advocates, for Appellant (In both the Appeals))

S. T. Desai, Senior Advocate, (*G. L. Sanghi* Advocate for *Messrs. J.B. Dadachanji & Co.,* with him), for Respondents (In both the Appeals).

The Judgment of the Court was delivered by

Sikri, J.—These appeals by Special Leave are directed against the judgment of the Madras High Court in Tax Cases Nos. 105 and 125 of 1963. The High Court by its common judgment dated 11th August, 1964 confirmed the orders of the Sale Tax Appellate Tribunal.

A common point of law is involved in both the cases and it will suffice if we give facts in Tax Case No. 105 of 1963 (Civil Appeal No. 633 of 1966) in which the respondent was one T. Narayanaswami Naidu, hereinafter referred to as the assessee.

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*C. A. Nos. 633 and 634 of 1966. 12th April, 1967.

The assessee is a dealer in cotton and cotton seeds. Before the Additional Commercial Tax Officer, Coimbatore, he claimed to deduct the sum of Rs. 12,32,756-45 as the value of purchases, other than the last purchases of cotton. The Commercial Tax Officer exempted Rs. 10,11,534-40 but disallowed the remaining amount on the ground that cotton worth Rs. 2,27,250-00 was in stock on 31st March, 1961. He found that subsequent disposal in the next year had not been proved and, therefore, it was liable to be taxed as a last purchase. In holding this he followed the diecision of the Kerala High Court in *Abdulsalam Rowther* v. *State of Kerala*[1]. The Appellate Assistant Commissioner (Commercial Taxes) upheld the order, but the Sales Tax Appellate Tribunal, dissenting from the decision of the Kerala High Court in *Abdulsalam Rowther* v. *State of Kerala*[1], accepted the appeal of the assessee and remanded the case to the Appellate Assistant Commissioer for disposal of resh in the light of observations made by it. The Department filed a revision under section 38 of the Madras General Sales Tax Act, hereinafter referred to as the Madras Act, and the High Court dismissed the revision. The State of Madras having obtained Special Leave, the appeal is now before us.

The learned Counsel for the appellant, Mr. Ramanujam, urges that the decision of the Kerala High Court in *Abdulsalam Rowther* v. *State of Kerala*[1], and of the Mysore High Court in *Hormusiji Hirjibhoy* v. *Commercial Tax Officer*[2], laid down the law correctly, and the Madras High Court erred in dissenting from these decisions in the present case (now reported as *State of Madras* v. *T. Narayanasami Naidu*[3].

Section 4 of the Madras Act provides :

"4. Notwithstanding anything contained in section 3, the tax under this Act shall be payable by a dealer on the sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second Schedule on the turnover in such goods in each year, whatever be the quantum of turnover in that year."

In other words, this section lays down that in respect of declared goods we have to look at the Second Schedule in order to find out the point at which the tax would be payable by the dealer. The Second Schedule describes the declared goods in respect of which a single point tax only is leviable under section 4. Item 2 of the Second Schedule is "Cotton, that is to say, all kinds of cotton (indigenous or imported) in its unamanufactured state, whether ginned or unginned, baled, pressed or otherwise, but excluding cotton waste". The point of levy is stated as "at the point of last purchase in the State".

The question that arise is : what is the exact meaning of the expression 'at the point of last purchase in the State"? In this connection it may be mentioned that section 14 of the Central Sales Tax Act, 1956, hereinafter referred to as the Central Act, declares certain goods as of special importance in inter-State trade and commerce, and cotton is one of the goods included in section 14.

Section 15 provides :

"Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely :—

(*a*) the tax payable under that law in respect of any sale of purchase of such goods inside the State shall not exceed two per cent. of the sale or purchase price thereof, and such tax shall not be levied at more than one stage.";

Section 4 of the Madras Act was intended to comply with section 15 of the Central Act. The relevant portion of section 3 of the Madras Act, on which the learned Counsel for the appellant relies, provides :

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1. (1961) 12 S.T.C. 98.
2. (1962) 13 S.T.C. 773.
3. I.L.R. (1965) 2 Mad. 83 : (1965) 16 S.T.C. 29 : A.I.R. 1965 Mad. 360.

"3 (1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than ten thousand rupees and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, shall pay a tax *for each year* at the rate of two per cent of his taxable turnover :"

Section 2 (*p*) defines "taxable turnover" to mean "the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed," and "year" is defined to mean "financial year". "Turnover" is defined in section 2 (*r*) as follows :

"turnover" means the aggregate amount for which goods are bought or sold, or supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea, grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover;....."

The learned Counsel for the appellant says that it is clear from sections 3 and 4 that a tax under the Madras Act is a yearly tax. In other words, he says, that just as under the Indian Income-tax Act each assessment year is a self-contained unit, so is the assessment year a self-contained unit under the Madras Act. If that is so, he argues, then what happens in subsequent years cannot be taken into consideration for determining the taxability of any purchase inside the State of declared goods. He says that the taxable event is the last purchase in the State during the assessment year and if stocks are held at the end of the assessment year it follows that the assessee holding the stocks is the last purchaser in the State.

In our opinion, this reasoning is fallacious. It is true that sections 3 and 4 speak of "a year", *i.e.*, the financial year, and it is only the turnover during that year that is liable to taxation in the hands of the assessee, but section 4 has to be read with the Second Schedule, and reading section 4 with the Second Schedule, it seems to us clear that a dealer is not liable to pay a tax on the purchases until the purchases acquire the quality of being the last purchases inside the State. In other words, when he files a return and declares the stock in hand, the stock in hand cannot be said to have been acquired by last purchase because he may still during the next assessment year sell it or he may consume it himself or the goods may be destroyed, etc. He would be entitled to claim before the assessing authorities that the character of acquisition of the stock in hand was undetermined; in the light of subsequent events it may or may not become the last purchase inside the State.

In our view this construction is in consonance with section 15 of the Central Act. If the argument of the learned Counsel for the State were to be accepted it would mean that the States could with impunity levy purchase tax on declared goods at more than one stage, *i.e.*, on purchases in the hands of one dealer during one assessment year and purchases of the same goods in the hands of another dealer in a subsequent assessment year, and so on. Therefore, we agree with the Madras High Court that the assessee is right in contending that he was entitled to claim deduction in respect of the value of the stock of Rs. 2,27,250 as being the purchases other than last purchases of cotton.

The Kerala High Court in *Abdulsalam Rowther* v. *State of Kerala*[1], following certain cases decided under the Income-tax Act, was influenced by the consideration that an assessee could not rely on subsequent events in order to escape taxation. That may be so even under the Sales Tax Act, but, according to our view, the assessee is not liable till the purchase of declared goods acquires the character of a last purchase within the Second Schedule referred to above. In *Hormusji Hirjibhoy* v. *Commercial Tax Officer*[2], the Mysore High Court also seems to have been impressed by similar considerations.

1. (1961) 12 S.T.C. 98. 2. (1962) 13 S.T.C. 773.

The judgment under appeal draws a distinction between taxable event, and a stage at which the levy of tax in the case of declared goods is subject to single point levy. This may cause confusion, and indeed, the High Court gives one illustration, which it found unnecessary to deal with. The illustration given is:

> "One can visualise a case for example, where goods mentioned above purchased on the 30th of March, 1960, may be exported by the purchaser himself, outside the State, on the 2nd of April, 1960. In that case the goods could not be assessed in 1960-61 in the hands of the exporting purchaser, because the taxable event did not occur in that year; it could not be assessed in the hands of the seller in 1959-60 because though the taxable even occurred that year, the single point stage was not reached in that year. One possible way of dealing with such a case is to assess it subsequently as escaped turnover."

In our opinion, in this illustration, the assessee would be liable in the financial year 1960-61 as the purchases became the last purchases in that year.

In the result the appeal fails and is dismissed with costs.

The facts in Tax Case No. 125 of 1963 (Civil Appeal No. 634 of 1966) are similar. That appeal is also dismissed with costs. The Appellate Assistant Commissioner (Commercial Taxes) will now dispose of the cases remanded to him by the Sales Tax Appellate Tribunal in the light of our judgment.

S.V.J. *Appeals dismissed.*

[END OF VOLUME (1968) I M.L.J. (S.C.)]